Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Policy and Rules Concerning the Interstate, Interexchange Marketplace	)	CC Docket No. 96-61
	)	
Implementation of Section 254(g) of the Communications Act of 1934, as amended	)	
	)	
1998 Biennial Regulatory Review -- Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets	)	CC Docket No. 98-183

COMMENTS OF MCI WORLDCOM, INC.

MCI WORLDCOM, INC.

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Dated: November 23, 1998

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SUMMARY

MCI WorldCom largely agrees with the Commission's tentative conclusion that it should modify the bundling restrictions to allow interexchange carriers to bundle CPE and enhanced services with their interstate, interexchange services. However, given the ease with which the ILECs' market dominance in local services could be exploited through the bundled offering of monopoly local services and competitive CPE and enhanced services, ILECs and their long distance affiliates should be prohibited from bundling CPE or enhanced services with local services.

The Commission's bundling restrictions originated in the Computer II proceeding. The Commission explained that the bundling of CPE with regulated telecommunications services could restrict customer choice and retard the development of a competitive CPE market. The Commission recognized, however, that there may not be any anticompetitive effects from bundling "[if] the markets for components of [a] commodity are workably competitive." Thus, the rationale for the prohibition against bundling CPE and telecommunications services implicitly rested on carriers' market power in regulated services.

In the Interexchange Notice, the Commission tentatively concluded that the CPE unbundling rule should be eliminated for interstate, interexchange services, "due to meaningful economic competition" in both the CPE and interstate, interexchange service markets. The Commission's tentative conclusion is clearly correct, for both CPE and enhanced services. Any attempt

by a nondominant IXC to force a customer to accept a bundle that she would not otherwise want will be unsuccessful, as customers can easily find alternative separate sources of supply of CPE, enhanced services and interexchange services at competitive prices.

ILECs, on the other hand, are overwhelmingly dominant in the local service market, and such market power could easily be exploited by bundling their monopoly local services with competitive CPE and enhanced services. Such bundling would enable ILECs to subsidize the provision of CPE and enhanced services with monopoly local service profits and would facilitate strategic pricing of discounted bundled offerings to favored large customers. Such cross-subsidization is an even greater threat in the case of enhanced service bundling, since the operational overlap between basic and enhanced services invites cost misallocation. ILECs should therefore be prohibited from bundling local service with CPE or enhanced services.

Similarly, although ILEC long distance affiliates are not dominant in interexchange services, they could exploit the ILECs' market power in local services through targeted discounts for packages of long distance, local services, CPE and enhanced services. The ILEC affiliates' market power in local services, derived from their unique relationship with the ILECs, will enable them to subsidize strategic pricing in bundled offerings including local services. Such monopoly subsidized bundling will also allow ILEC affiliates to gain an advantage over unaffiliated

IXCs, which lack the monopoly earnings necessary to subsidize the provision of competitive product or services.

Adding to the anticompetitive potential of ILEC long distance affiliate bundles of interexchange and local services, together with CPE and enhanced services, is the monopoly subsidy arising from ILEC access charges that is reflected in ILEC affiliates' long distance charges. While inflated ILEC access charges are a necessary component of almost all IXC interexchange charges, for ILEC long distance affiliates, ILEC access charges represent merely an internal accounting transaction. Thus a tremendous profit is built into ILEC affiliate long distance rates, which provides a funding pool that can be used to subsidize the provision of other products, including CPE and enhanced services, and thereby to fund strategic pricing with a view toward stifling local competition.

Furthermore, to the extent that it might otherwise be possible to detect an ILEC affiliate's failure to properly impute access charges and other costs in setting its interexchange rates, the addition of CPE and enhanced services to ILEC affiliate bundles of long distance and local services would render such detection virtually impossible. The ease of cross-subsidization, and the increased risk of undetected predation resulting from a more complex bundle, require that CPE and enhanced services be excluded from any ILEC affiliate bundle of local and long distance services.

Allowing IXCs and CLECs to bundle, while prohibiting ILECs

and ILEC affiliates from bundling CPE or enhanced services with local services, would not place any carrier at a disadvantage and would be pro-competitive. As is the case with independent IXCs, CLECs have no market power in the local service market and therefore cannot harm competition by bundling their local services with CPE or enhanced services. Accordingly, the unbundling rules should be eliminated for CLEC local services for all of the same reasons given for the elimination of the rule as to all IXCs other than ILEC long distance affiliates offering packages of interexchange and local services. Given the ILECs' overwhelming dominance in the local services market, and the daunting economics of local service competition, the inability to bundle local services with CPE and enhanced services could not, as a practical matter, significantly disadvantage ILECs vis-a-vis CLECs offering bundled packages of local service and CPE or enhanced services. Furthermore, such bundling could give CLECs a foot in the door, especially in the hard-to-crack residential local service market.

The Commission should also clarify the nature of the bundling to be allowed for enhanced services. MCI WorldCom proposes that IXCs be permitted a greater degree of enhanced service bundling than simply the bundling that is inherent in the provision of any interexchange enhanced service. IXCs should also be permitted to bundle any interexchange enhanced service with interexchange basic services other than the interexchange basic transmission that underlies the interexchange enhanced

service.

With regard to whether the basic service portion of a bundled offering should still be offered separately on an unbundled, tariffed basis if the rules are eliminated, such a requirement is unnecessary. If the Commission's Detariffing Order is upheld on appeal, the issue will be moot. If the tariffing of interexchange services continues, the issue will still be moot in many situations, as the most practical way to bundle is simply to offer a discount off the tariffed rate for the interexchange service portion of the bundle. Even aside from those situations, the intense competition that characterizes the interexchange and enhanced service and CPE markets ensures that consumers will have choices of bundled and unbundled services and products at competitive prices.

With regard to the issue concerning the allocation of revenues from bundled offerings for universal service fund (USF) contribution purposes, such allocation should not raise any significant obstacles to modification of the unbundling rules. The charge for a typical bundled offering will simply be the sum of a stated discount off the tariffed rate for the basic service portion of the bundle plus the contractual charge for the CPE or enhanced service. The USF contribution for such a bundle would be the discounted charge for the volume of service used by a particular customer. Similarly, modification of the unbundling rules should not affect the Part 68 rules or the "all-carrier" rule.

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COMMENTS OF MCI WORLDCOM, INC.

Introduction

MCI WorldCom, Inc., by its undersigned attorneys, submits these comments in response to the Further Notice of Proposed Rulemaking (Further Notice) in the above-referenced dockets seeking comments on the Commission's review of the rules requiring the unbundling of customer premises equipment (CPE) and enhanced services from regulated telecommunications services.[1] As explained herein, MCI WorldCom largely agrees with the Commission's proposal to dispense with these rules in the interexchange market. The one exception should be in the case of interexchange affiliates of incumbent local exchange carriers (ILECs), whose unique relationship to the ILECs requires that the bundling restrictions be retained where such affiliates include local services in their bundled offerings. Those restrictions

[1] FCC 98-258 (released Oct. 9, 1998).

should also be retained for the ILECs themselves in their provision of local exchange service.

As recited in the Further Notice, the bundling restrictions originated in the Computer II[2] proceeding. The Commission adopted a rule requiring all common carriers to sell or lease CPE separate and apart from their regulated communications services and to offer CPE solely on a deregulated, non-tariffed basis.[3] This rule was codified at 47 C.F.R. § 64.702(e). The Commission explained that the bundling of CPE with regulated telecommunications services could force customers to purchase unwanted CPE in order to obtain necessary transmission services, thus restricting customer choice and retarding the development of a competitive CPE market.[4]

Only a carrier possessing market power in the bundled service, of course, could impose such a forced choice on the customer, and the Commission recognized that there may not be any anticompetitive effects from bundling "[i]f the markets for

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[2] Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 FCC 2d 384 (1980)(Computer II Final Decision), mod. on reconsideration, 84 FCC 2d 50 (1981)(Computer II Recon. Order), mod. on further reconsideration, 88 FCC 2d 512 (1981), aff'd sub nom. Computer and Communications Industry Ass'n. v. FCC, 693 F.2d 198 (D.C. Cir. 1982)(CCIA), cert. denied, 461 U.S. 938 (1983).

[3] Further Notice at ¶ 11, citing Computer II Final Decision, 77 FCC 2d at 496.

[4] Further Notice at ¶ 11, citing Computer II Final Decision, 77 FCC 2d at 443 n. 52.

components of [a] commodity are workably competitive."[5] Thus, the rationale for the prohibition against bundling CPE and telecommunications services implicitly rested on carriers' market power in regulated services. This made sense at the time, since almost all telecommunications services were provided on a monopoly or quasi-monopoly basis. Although "specialized carriers" possessing no market power, such as MCI, had begun to offer interexchange and other services on a competitive basis,[6] the Commission drew no distinctions based on market power in the formulation or application of the rule.

Computer II also set forth the "basic service"/"enhanced service" dichotomy -- which is parallel to the "telecommunications service"/"information service" dichotomy under the Telecommunications Act of 1996[7] -- and held that carriers "that own common carrier transmission facilities and provide enhanced services ... must acquire transmission capacity pursuant to the same prices, terms, and conditions reflected in their tariffs when their own [common carrier transmission] facilities

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[5] Id.

[6] Computer II Final Decision, 77 FCC 2d at 468-69.

[7] Further Notice at ¶ 32. The terms "basic" and "enhanced" will be used interchangeably with "telecommunications" and "information," depending on the statutory or regulatory usage relevant to the discussion. Generally, where either terminology would fit the context, the "basic/enhanced" rubric will be used, following the practice in the Further Notice.

are utilized [in the provision of their enhanced services]."[8] This unbundling requirement has been interpreted subsequently to mean that "carriers that own common carrier transmission facilities and provide enhanced services must unbundle basic from enhanced services and offer transmission capacity to other enhanced service providers under the same tariffed terms and conditions under which they provide such services to their own enhanced service operations."[9] This unbundling rule has never been codified.[10]

In the Interexchange Notice,[11] the Commission tentatively concluded that it should modify the CPE bundling restriction to allow nondominant interexchange carriers (IXCs) to bundle CPE with their interstate, domestic, interexchange services. The Commission noted that bundling may benefit consumers and promote competition, as long as the markets for the components of the bundle are substantially competitive. The Commission tentatively

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[8] Computer II Final Decision, 77 FCC 2d at 475.

[9] Further Notice at ¶ 33 (quoting Independent Data Communications Manufacturers Ass'n, Inc. Petition for Declaratory Ruling and American Telephone and Telegraph Company Petition for Declaratory Ruling, 10 FCC Rcd 13717, 13719 (1995)).

[10] The Commission also never explicitly required that the provision of enhanced services always be "separate and distinct from provision of common carrier communications services" as it did in the case of CPE. 47 C.F.R. § 64.702(e).

[11] Notice of Proposed Rulemaking, Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended,, 11 FCC Rcd 7141 (1996)(subsequent history omitted).

concluded that, in light of the development of substantial competition in the markets for CPE and interstate, interexchange services, it was unlikely that nondominant interexchange carriers could engage in the type of anticompetitive conduct that led the Commission to prohibit such bundling. The Further Notice points out that the Commission has previously determined that the CPE market is competitive and that the interstate, domestic, interexchange market is substantially competitive.[12] AT&T raised the issue of whether the enhanced service unbundling rule should also be modified for the same reasons.[13]

I. THE CPE UNBUNDLING RULE SHOULD BE MODIFIED FOR IXCs

A. Because of the Intense Competition in the Interexchange Service and CPE Markets, Elimination of the CPE Unbundling Rule for IXCs Would be Pro-Consumer

The Further Notice seeks comment on the tentative conclusion stated in the Interexchange Notice -- namely, whether the CPE unbundling rule should be eliminated for interstate, domestic, interexchange services, "`due to meaningful economic competition' in both the CPE and interstate, domestic, interexchange markets."[14] With the exception of one anomalous situation, to be discussed below, the Commission's tentative conclusion is clearly correct. In addition to the multiple citations in the Further

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[12] Further Notice at ¶ 12.

[13] Id. at ¶ 34.

[14] Id. at ¶ 13 (quoting 47 U.S.C. § 161).

Notice, there is substantial economic evidence confirming the intensely competitive nature of the interexchange market.[15] As the Commission pointed out in the WorldCom Merger Order, competition with AT&T has continued to grow since AT&T was declared nondominant in 1995.[16]

The Further Notice points out that the Independent Data Communications Manufacturers Association (IDCMA) has argued that even an IXC without market power might have the ability to force consumers of its interexchange services to purchase CPE from the same IXC. With one exception, to be discussed below, it is difficult to see how that could be done, however, given the intensely competitive nature of the interexchange and CPE markets. As the Commission explained in the Competitive Carrier Rulemaking,[17] nondominant IXCs -- which are now all IXCs -- are

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[15] See, e.g., Declaration of Robert Hall at ¶¶ 120-81, Exhibit E to Comments of MCI Telecommunications Corp., Application of BellSouth Corporation, et al., for Provision of In-Region, InterLATA Services in Louisiana, CC Docket No. 98-121 (filed Aug. 4, 1998).

[16] Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc. at ¶ 40, CC Docket No. 97-211, FCC 98-225 (released Sept. 14, 1998).

[17] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Therefor, CC Docket No. 79-252, Notice of Inquiry and Proposed Rulemaking (Competitive Carrier Notice), 77 FCC 2d 308 (1979); First Report and Order (Competitive Carrier First Report), 85 FCC 2d 1 (1980); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Further Notice of Proposed Rulemaking, 47 Fed. Reg. 17308 (1982); Second Report and Order (Competitive Carrier Second Report), 91 FCC 2d 59 (1982), recon. denied, 93 FCC 2d 54 (1983); Third Report and Order (Competitive Carrier Third Report), 48 Fed. Reg.

not able to "force" consumers to do anything, given the choices that are now available. If an IXC were to attempt to induce customers to purchase CPE from it by requiring such purchases as a condition of taking the IXC's interexchange service or by offering a discount on the CPE only to customers of its interexchange service, customers could easily find alternative separate sources of supply of both CPE and interexchange services at competitive prices. Whatever pricing advantage an IXC could offer by selling service and CPE at a bundled discounted price would have to be cost-related -- and therefore not harmful to competition -- or the IXC could not profitably offer such a bundled discount in the long run.[18]

To the extent that IXCs are in a better position than manufacturers to offer such bundles, such an advantage should not have any impact on the vigor of competition in the CPE market. Now that AT&T has sold its equipment manufacturing operations, there is no IXC in a position to favor its own equipment through

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46791 (1983); Fourth Report and Order (Competitive Carrier Fourth Report), 95 FCC 2d 554 (1983), vacated, AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), cert. denied, MCI Telecommunications Corp. v. AT&T, 113 S. Ct. 3020 (1993); Fourth Further Notice of Proposed Rulemaking, 96 FCC 2d 1191 (1984); Fifth Report and Order (Competitive Carrier Fifth Report), 98 FCC 2d 1191 (1984); Sixth Report and Order (Sixth Report), 99 FCC 2d 1020 (1985), vacated sub nom., MCI Telecommunications Corp. v FCC, 765 F.2d 1186 (D.C. Cir. 1985).

[18] See Competitive Carrier Notice, 77 FCC 2d at 334-38 at ¶¶ 46-54; Competitive Carrier First Report, 85 FCC 2d at 20-22, 30-33 at ¶¶ 55-59, 88-96; Competitive Carrier Fourth Report, 95 FCC 2d at 557-62, ¶¶ 6-12.

bundling. Moreover, IXCs are not in a position to "play favorites" in determining which CPE manufacturers to deal with in any way that would injure competition in the CPE market. If an IXC were to team with one manufacturer for reasons other than cost and quality, it would simply end up handicapping itself in competing with other IXCs' bundled offerings. Any injury to the CPE market thus would be short-lived. Similarly, an IXC could not impede competition in the CPE market by "locking in" customers through the use of long-term contracts and early termination penalties.[19] "Locking in" only makes sense as an anticompetitive strategy if there is some current advantage derived from market power to be locked in beyond the point in time where that advantage might otherwise be eroded. Since no entity has any market power in interexchange services or CPE, there is no anticompetitive advantage to be locked in through long-term contracts.[20]

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[19] See Further Notice at ¶ 13.

[20] Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992), cited by some parties as an illustration of a firm's ability to lock in customers of a product in which it has no market power, is inapposite here. See Further Notice at ¶ 13 & n. 38. There, the Court held that summary judgment for defendant was properly denied because of direct evidence that it had raised prices and driven out competition in the service and spare parts "aftermarkets" as a result of having locked in customers by means of high initial equipment costs. 504 U.S. at 477-78. Here, there is no indication that any IXC could possibly be in a position to charge higher prices for CPE -- or interexchange services, for that matter -- as a result of having locked in customers through long-term contracts and early termination penalties.

The Further Notice requests comment on the contention that eliminating the CPE unbundling rule is not necessary to benefit consumers because the rule does not preclude IXCs from offering the convenience of one-stop shopping for service/CPE packages; it only prohibits bundled discounted pricing.[21] Although one-stop shopping does provide convenience to consumers, the rule still prevents IXCs from passing along the cost savings resulting from joint marketing and sales of services and CPE. Thus, elimination of the rule would bring about benefits to consumers and more vigorous competition in interexchange services and CPE.

Because of the absence of market power held by any entity in the interexchange service or CPE markets, and the lack of leverage in either of those markets that could be secured through long-term contracts, bundling by IXCs could not violate Sections 201(b) or 202(a) of the Communications Act. As the Commission explained in Competitive Carrier, firms without market power will not be able to charge excessive or predatory rates in violation of Section 201(b) or price discriminate in violation of Section 202(a), due to the availability of alternatives at the competitive market price.[22] Similarly, with one exception discussed below, IXCs could not subsidize their provision of

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[21] Further Notice at ¶ 14.

[22] See Competitive Carrier Notice, 77 FCC 2d at 334-38 at ¶¶ 46-54; Competitive Carrier First Report, 85 FCC 2d at 20-22, 30-33 at ¶¶ 55-59, 88-96; Competitive Carrier Fourth Report, 95 FCC 2d at 557-62, ¶¶ 6-12.

equipment from the charges for interexchange service, as IDCMA argues,[23] since they will not be able to achieve supracompetitive earnings in their services with which to subsidize their CPE.[24] IDCMA's assertion that an IXC "`could choose to make transmission service available only to customers that agreed to obtain carrier-provided CPE'"[25] cannot alter this analysis, since such an IXC would only deprive itself of interexchange service customers by doing so. Similarly, interexchange service price increases could only harm an IXC charging higher than the market price.

B. Bundling CPE With Interexchange Services Would Not Result in the Reregulation or Retariffing of CPE

The Further Notice also poses the question, initially raised by IDCMA, of whether the bundling of CPE with interexchange services would lead to the retariffing or reregulation of CPE, since the Commission would have to ensure that a bundle of CPE and interexchange transmission service complies with Title II requirements.[26] It follows from the analysis set forth above, however, that the bundling of CPE with interexchange services should not create any such problems. Nondominant services are

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[23] Further Notice at ¶ 18.

[24] As will be explained below, ILEC long distance affiliates are an exception to the general inability to generate supracompetitive earnings in interexchange services.

[25] Further Notice at ¶ 16.

[26] Id. at ¶ 17.

not subject to any regulatory requirements that would bring about the reregulation or retariffing of CPE. Nondominant carriers are not required to submit any cost justification for their rates, which are presumed to be reasonable and nondiscriminatory.[27] The Commission therefore does nothing on an ongoing basis "to ensure that ... [nondominant carrier] regulated transmission offering[s] comply with Title II"[28] unless a complaint is filed challenging such offerings. Indeed, the Commission has already determined in the Detariffing Order that nondominant interexchange rates need so little policing that they should not even be tariffed.[29] Whatever the outcome of the appeals of the Detariffing Order, there is certainly nothing about bundled offerings that would require the Commission to start taking action on an ongoing basis to ensure compliance with Title II.

Moreover, assuming that IXCs continue to file tariffs -- once the appeals of the Detariffing Order, including any remand proceedings resulting therefrom, are resolved -- it would be feasible to tariff bundled offerings so as not to "retariff CPE."

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[27] See Competitive Carrier First Report, 85 FCC Rcd at 33-35.

[28] Further Notice at ¶ 17.

[29] Second Report and Order, Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, CC Docket No. 96-61, 11 FCC Rcd 20730 (1996), stay granted sub nom. MCI Telecommunications Corporation v. FCC, No. 96-1459 (D.C. Cir. Feb. 13, 1997), Order on Reconsideration, 12 FCC Rcd 15014 (1997), further recon. pending.

For example, a tariff could recite the charges, terms and conditions for a long distance service, setting forth all of the information as to the service that typically appears in a tariff, but also including a reference to a discount or credit that would be available to customers taking unnamed CPE pursuant to a separate contract. The tariff would thus reference the contract governing the provision of the CPE, without setting forth any of the terms and conditions of the contract, which would only appear in a separate document to be provided to the customer. Such a reference would allow the carrier to offer the service and the CPE for a discounted bundled price without in any way tariffing the CPE.

If the Commission believes that the term "CPE" should not even appear in the tariff, the tariff could refer to unnamed "products," which would not necessarily have to be CPE. At the same time, any concerns as to the possibility of an untariffed rebate could be alleviated by requiring that the discount or credit be graduated according to the value of the CPE or other products purchased. In that way, the total charge for any given amounts of tariffed services and untariffed products could be known in advance, simply by consulting the tariff.

C. ILECs Should Not be Permitted to Bundle Mixed-Use CPE With Local Services, and ILEC Affiliates Should Not be Permitted to Include Local Services With Their Bundled Offerings of Services and CPE

The Further Notice also raises issues concerning the

possible anticompetitive effects of allowing the bundling of CPE with interexchange services by Bell Operating Company (BOC) and other ILEC affiliates providing interexchange services, as well as the bundling of CPE with local services by carriers offering local and access services. The Further Notice points out that the LEC Classification Order[30] held the BOCs' and other ILECs' long distance affiliates to be nondominant in their provision of in-region, interstate, interLATA services and suggests that any bundling relief should therefore be extended to such affiliates.[31]

Generally, MCI WorldCom agrees that the nondominance of ILEC long distance affiliates suggests that they may not be able to force interexchange rates upward by reducing the supply of such services or charge substantially above the competitive market price for such services. In that sense, they are nondominant, and the Commission was probably correct in deciding not to impose price cap rules and certain other aspects of dominant carrier regulation on the ILEC affiliates' interexchange services. Those affiliates, however, are in a different situation from

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[30] Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Market Place, CC Docket Nos. 96-149, 96-61, Second Report in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15756, 15802 (LEC Classification Order), Order on Reconsideration, 12 FCC Rcd 8730 (1997), Order, DA 98-556 (rel. March 24, 1998)(LEC Classification Partial Stay Order), further recon. pending.

[31] Further Notice at ¶ 24.

independent IXCs, and those differences directly affect the policies implicated by the unbundling rules. Since those differences derive from the ILECs' market power in local exchange services, it is first necessary to address the application of the unbundling rules to ILEC local services.

ILECs clearly have an advantage derived from market power that could be exploited through the offering of local service and mixed-use CPE (i.e., CPE used partly for interstate and partly for intrastate communications) at a bundled price. There is still almost no competition in any category of local service.[32] Over two-and-a-half years after the enactment of the Telecommunications Act of 1996, no BOC has yet made the showing required by Section 271(d) for entry into in-region long distance service. The BOCs' and other ILECs' market dominance in local services thus remains about what it was when Computer II imposed

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[32] See, e.g., WorldCom Merger Order at ¶¶ 168, 170 & n. 465, 172, 183 (ILECs still dominant in both residential and large business local service and access service markets, with 98.6% of all local exchange and exchange access revenues); Further Notice of Proposed Rulemaking at ¶ 51 & n. 151, Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, CC Docket No. 95-20, and 1998 Biennial Regulatory Review --Review of Computer III and ONA Safeguards and Requirements, CC Docket No. 98-10, FCC 98-8 (released Jan. 30, 1998)(BOCs remain overwhelmingly dominant providers of local exchange and exchange access services, accounting for about 99.1% of the local service revenues in their service territories); Memorandum Opinion and Order at ¶ 22, Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In South Carolina, CC Docket No. 97-208, FCC 97-418 (released Dec. 24, 1997)(BellSouth's share of the local service market in South Carolina is 99.8%).

the unbundling rules on all carriers; time has stood still for the ILECs. There is therefore no rational basis for altering the unbundling rules for ILEC local services.[33]

Moreover, such market dominance could easily be exploited by bundling monopoly local services with competitive mixed-use CPE in a number of ways. First, there is the problem identified in Computer II, whereby customers are forced by bundling to take the ILEC's CPE and/or the ILEC subsidizes the provision of CPE with monopoly local service profits.[34] It might be argued that the CPE market is intensely competitive and therefore could not be harmed by such bundling, but the CPE market was competitive at the time of Computer II; indeed, that competition was itself the rationale for the unbundling rule.[35] As will be discussed in Part II below, the bundling of enhanced services with local regulated services poses an even greater threat of this type of competitive harm.

The second type of competitive harm threatened by the bundling of CPE with ILEC local services is the use of strategic pricing to stifle incipient local service competition. An ILEC could use a bundled offering to avoid the constraints on

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[33] See, e.g., Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971)(agency must rationally justify any policy shift).

[34] See Computer II Final Decision, 77 FCC 2d at 443, n. 52.

[35] Id. at 443-47.

customer-specific pricing otherwise imposed on regulated services. Thus, a discounted bundled offering could be made to a large customer that might be vulnerable to competitive LEC (CLEC) competition without having to make the same offer to other customers, even those who might be similarly situated. The ILEC could choose to make available to other customers, who have no competitive alternatives, only the tariffed local service portion of the bundled offering at a much less favorable rate. Used in such manner, bundling could be a highly effective strategic pricing tool in the hands of the ILECs to pick off CLEC competition. Such strategies could be funded through the monopoly earnings on the local service rates charged generally. Since CLEC competitors have no monopoly captive rate base to fund strategic pricing, they would not be in a position to respond, particularly if they are contributing to the ILECs' subsidy pools by reselling the ILEC's local services.

Similarly, assuming, without conceding, that BOC and other ILEC long distance affiliates may offer bundled packages of interexchange and local services,[36] they should not also be allowed to add CPE to the bundle. Although ILEC long distance

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[36] MCI WorldCom's predecessor, MCI Telecommunications Corporation, has sought reconsideration of the decision in the Non-Accounting Safeguards Order to allow the BOCs' Section 272 affiliates to provide local as well as interLATA services. Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996), recon. pending (subsequent history omitted).

affiliates were found in the LEC Classification Order to be nondominant in interLATA services, they could exploit ILECs' market power in local services through targeted discounts for packages of long distance, local services and CPE, whether the affiliate was providing the local service through its own facilities, or by means of UNEs purchased from the ILEC, or was reselling the ILEC's local service.[37]

As MCI WorldCom's predecessors and other parties have explained, in their comments supporting the CompTel et al. request that ILEC affiliates providing local services also be treated as ILECs, where an ILEC confers monopoly-derived benefits on an affiliate that also provides local service, the affiliate occupies the same market position as the ILEC itself and should be treated as an ILEC, subject to the requirements of Section 251(c) of the Communications Act. To the extent that such an affiliate is not treated as an ILEC, it will be able to combine the market dominance of an ILEC in its provision of local service with the freedom of an unaffiliated nondominant carrier. Its

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[37] Although the term "interLATA" is not precisely coterminous with "interexchange," "interLATA" will be used throughout as a rough equivalent to "interexchange" where reference is made to statutory provisions or Commission orders specifying "interLATA" service or the context otherwise requires such usage. See Public Notice, Petition for Rulemaking Filed, 12 FCC Rcd 6473 (1997)("interexchange" encompasses "interLATA" and "intraLATA toll"). The term "long distance" will also be used generically to encompass both "interexchange" and "interLATA." See LEC Classification Order at ¶ 5 n. 19 ("long distance" used to refer to interLATA services provided by BOC affiliates and interexchange services provided by IXCs).

"competitive LEC" status can easily be exploited as a technique for the ILEC to avoid the strictures of Section 251(c) entirely. In effect, such an affiliate becomes an unregulated monopolist. (See Comments appended as Attachment A.)[38]

Whatever decision the Commission ultimately reaches as to the CompTel request or in other proceedings affecting the regulatory treatment of an ILEC affiliate providing local service, the marketplace advantages of such an affiliate should at least be taken into account in reviewing the unbundling rules. Where an ILEC affiliate is providing a package of long distance and local services, it therefore should not be permitted to add CPE to the bundle. Its market power in local services, derived from its affiliation with and benefits from the ILEC, will enable it to inflict the same types of competitive harms as the ILEC itself, as discussed above, including cross-subsidization and targeted pricing favoring large customers. BOCs will still possess such market power in local services after they are authorized to provide in-region, interLATA services under Section 271 of the Act, and the same bundling analysis therefore applies to them.

Moreover, such monopoly-subsidized bundling will also allow an ILEC affiliate to gain an advantage over unaffiliated IXCs

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[38] Comments of MCI Telecommunications Corporation, Competitive Telecommunications Association, et al., Petition On Defining Certain Incumbent LEC Affiliates As Successors, Assigns, or Comparable Carriers Under Section 251(h) of the Communications Act, CC Docket No. 98-39 (filed May 1, 1998)(attached hereto).

also selling packages of long distance and local services and CPE. Unaffiliated IXCs have no dominance in any market and thus lack the ability to subsidize the provision of any competitive products or services with earnings from other services, since they are all competitive.

Adding to the anticompetitive potential of ILEC long distance affiliate bundles of interexchange and local services and CPE is the monopoly subsidy arising from the ILECs' access charges, which are reflected in their long distance rates. Based on Regional Bell Operating Company (RBOC) and Commission data, there can no longer be any doubt that ILEC interstate access charges are vastly in excess of their costs, earning nearly 70 percent before interest, taxes, depreciation and amortization.[39] Since ILEC access charges are a necessary component of almost all IXC interexchange charges, the competitive interexchange market price necessarily reflects ILEC tariffed access charges.

For ILEC long distance affiliates, however, ILEC access charges represent merely an internal accounting transaction. On a corporate-wide basis, the actual cost of access for ILEC long distance services is only the cost incurred by the ILEC local network in providing access to its long distance affiliate, not the tariffed rate for access that is charged to other IXCs. Thus, the ILEC affiliate's retail long distance charges reflect a

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[39] See MCI WorldCom, Inc. Comments at 9-11 & n. 19, Access Charge Reform, et al., CC Docket No. 96-262, et al. (filed Oct. 26, 1998)(MCI WorldCom Access Reform Comments).

huge profit on the access portion of those charges -- a profit that most unaffiliated IXCs cannot earn because they are still paying inflated access rates to the ILECs, on whom they are still dependent for access to over 98 percent of all subscriber lines.[40]

The tremendous profit reflected in ILEC affiliate long distance rates, resulting from the staggering earnings on the access charges built into those rates, provides a funding pool that can be used for anticompetitive purposes, including subsidization of the provision of interexchange services and CPE and strategic pricing of bundled offerings. As the Commission explained in Computer II, bundling can be used "as an anticompetitive marketing strategy, e.g., to cross-subsidize competitive by monopoly services."[41] In this case, the cross-subsidy is generated "upstream" by profits in the ILECs' monopoly access services, which can be used to fund below-market prices for bundled offerings including CPE and the ILECs' "downstream" long distance services to favored large customers. Such bundled pricing can be used to discipline competitors who try to match the ILECs' bundled service/CPE prices without the benefit of monopoly funding pools. The resulting price squeeze on IXCs using ILEC access services to provide long distance services adds

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[40] Id. at 9.

[41] Computer II Final Decision, 77 FCC 2d at 443, n. 52. See Further Notice at ¶ 18.

another anticompetitive weapon to the ILECs' marketing of long distance and local services and CPE.[42]

ILECs typically argue that no such access-derived subsidy pools exist, since every dollar of interexchange service sold by an ILEC affiliate takes a dollar away from the ILEC's net access revenue. In fact, however, an ILEC can maximize its total profits by reducing the price of its interexchange service, thereby increasing the demand therefor and, accordingly, for its switched access services as well.[43] The most likely consequence of such a strategy would be that total sales by competitive IXCs would fall (because of the ILEC affiliate's capture of increased market share) by less than the expansion of the ILEC's company-wide access and interexchange revenues combined. As a result, the "opportunity cost" to the ILEC of forgone net access revenue resulting from an increase in its own interLATA traffic would be less than the markup over cost paid by IXCs for access.[44]

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[42] The ILECs' high level of local and access service earnings rebuts the standard ILEC argument that, due to price cap regulation, they have no incentive to cross-subsidize using local and access service earnings. The caps are so high, as demonstrated by the high earnings, that there is no need to raise local and access rates to subsidize competitive services and products in order to strategically price bundled offerings; they are already high enough to provide a substantial subsidy pool for such purposes.

[43] See Jean Tirole, The Theory of Industrial Organization 69-72, Chapter 3 (1995).

[44] See Franklin M. Fisher, An Analysis of Switched Access Pricing and the Telecommunications Act of 1996 at 8, attached to Reply Comments of MCI Telecommunications Corp., Implementation of the Local Competition Provisions in the Telecommunications Act of

ILECs also argue that ILEC losses resulting from below market pricing of service/CPE bundles could never be recouped later, since the ILEC affiliates lack market power in interexchange services. As explained above, however, ILEC affiliates providing local services do enjoy market power in those services, which could be brought to bear on the market for bundled offerings. Thus, the combination of ILEC long distance and local services with CPE is an especially potent anticompetitive cocktail that should remain prohibited.

Furthermore, the addition of CPE to an ILEC affiliate's bundle of interexchange and local services can be used to circumvent imputation requirements. To the extent that it might otherwise be possible to detect an ILEC affiliate's failure to properly impute access charges and other costs in setting its interexchange rates, the addition of CPE to ILEC affiliate bundles of long distance and local services would render such detection virtually impossible. There might be some chance of detecting and preventing a failure to impute costs for a bundle of long distance and local services, since they are both regulated, tariffed services, and the local service would typically be purchased from the ILEC. As more products are added to the bundle, however, particularly unregulated products, it

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1996, CC Docket No. 96-98 (filed May 30, 1996). Moreover, to the extent that IXCs are using special access or CLEC services to provide interexchange services, the ILEC affiliate's provision of interexchange service using the ILEC's switched access service will incur no such "opportunity costs." Id. at 7-8.

becomes more difficult to measure the ILEC affiliate's true costs and thus more difficult to detect a failure to impute and the resulting predation. The ease of cross-subsidization, as discussed above, and the increased risk of undetected predation resulting from a more complex bundle, require that CPE be excluded from any ILEC affiliate bundle of local and long distance services.

Finally, to the extent that BOCs or other ILECs manufacture CPE, their inherent cost advantages will be magnified in offering bundles of services and CPE. If an ILEC no longer has to purchase CPE from a third party, its bundled offering costs both diminish and become harder to detect, aggravating the cross-subsidy and predation potential of any such bundled offering, especially where the same affiliate manufactures CPE and provides long distance and local services.[45]

D. Allowing IXCs and CLECs to Bundle, While Prohibiting ILECs and ILEC Affiliates From Bundling CPE With Local Services, Would Not Place Any Carrier at a Disadvantage and Would be Pro-Competitive

Although the unbundling rules should remain in place for ILEC local exchange services, whether sold by the ILEC or resold or otherwise provided by an ILEC affiliate, there is no reason to

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[45] BOCs are permitted to manufacture CPE (and provide local services) through the same Section 272 affiliate used to provide in-region interLATA services. Non-Accounting Safeguards Order at ¶¶ 61, 312. MCI WorldCom's predecessor, MCI, has sought reconsideration of the decision to allow the Section 272 affiliates to provide local services.

maintain those restrictions on CLEC local services. As in the case of IXCs unaffiliated with ILECs, CLECs have no market power in the local service market and therefore cannot harm competition in CPE, or in local services, by bundling their local services with CPE. Accordingly, the unbundling rule should be eliminated for CLEC local services for all of the same reasons given above for the elimination of the rule as to all interexchange service providers other than ILEC long distance affiliates offering bundles including local services.

The Further Notice also raises a question as to whether ILEC long distance affiliates would be at a competitive disadvantage vis-a-vis IXCs offering packages of long distance and local services and CPE if different unbundling rules were applied based on ILEC affiliation.[46] It is difficult to see how ILECs or ILEC affiliates could be placed at a competitive disadvantage or how competition might be otherwise injured by the imposition of a different unbundling regime on ILECs and their affiliates, at least in the manner suggested in these comments.

First, as to the application of the unbundling rules to local service providers, the ILECs are so overwhelmingly dominant in the local service market, and the economics of local service competition so daunting under current conditions,[47] that an

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[46] Further Notice at ¶¶ 27, 29.

[47] Even the RBOCs now admit that, given the inadequate discounts, competitive local service cannot be provided economically via resale. See Application For Transfer of Control

inability to bundle local services with CPE could not, as a practical matter, significantly disadvantage ILECs vis-a-vis CLECs offering bundled packages of local service and CPE. At the same time, such bundling could give CLECs a foot in the door, especially in the hard-to-crack residential local service market.[48]

The Competitive Carrier rulemaking offers a useful historical analogy here. For 15 years, from the Competitive Carrier First Report[49] to the AT&T Reclassification Order,[50] AT&T

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at 30, In the Matter of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer of Control (filed Oct. 2, 1998). See also, MCI WorldCom Access Reform Comments at 11-21; "Telecommunications (A Special Report): Overview -- Out of the Loop: What ever happened to competition for local phone service? It's simple economics," THE WALL STREET JOURNAL, p. R6, Sept. 21, 1998 (resale discounts not sufficient to allow CLECs to cover costs profitably); "The Quiet War," DALLAS MORNING NEWS, Nov. 16, 1997 (ILEC per line charges to CLECs higher than ILEC retail local service rates); "Stonewalling Local Competition: The Baby Bell Strategy to Subvert the Telecommunications Act of 1996," CONSUMER FEDERATION OF AMERICA, January 1998, pp. 58-62, 93 (UNEs and local resale improperly priced).

[48] CLECs have such a small sliver of the local service market, especially the residential segment, that they could be relatively significantly benefitted by being allowed to bundle, while not noticeably affecting the ILECs' relative share of the local market. For example, a doubling of the current CLEC share of the overall local service market, from less than two percent to less than four percent, would reduce the ILEC share about two percent, leaving them with over 96 percent of the total, based on current industry statistics. See, e.g., WorldCom Merger Order at ¶¶ 168, 170 & n. 465, 172, 183.

[49] 85 FCC 2d at 22-23.

[50] Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, 11 FCC Rcd 3271 (1996), recon. denied, FCC 97-366 (released Oct. 9, 1997).

was subject to dominant carrier regulation, while resale carriers and "specialized common carriers," such as MCI WorldCom's predecessors, were treated as nondominant.[51] It is worth noting that AT&T's dominant status, which subjected it to the full panoply of Title II regulation, was based on its pre-divestiture control of the local access facilities for over 80 percent of the nation's subscriber lines, its "overwhelming" interexchange market share "and the current difficulties of entering this market...."[52] Just as the dominant/nondominant scheme facilitated, rather than harmed, the development of interexchange competition, application of a different bundling regime to ILECs and CLECs will facilitate the development of local competition, given the advantages conferred on the ILECs by their market dominance relative to CLECs.[53]

Similarly, different unbundling rules for ILEC affiliates and unaffiliated IXCs will spur, rather than inhibit, competition in interexchange services and in the joint provision of

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[51] Competitive Carrier First Report, 85 FCC 2d at 28 n. 69.

[52] Id. at 23.

[53] Allowing CLECs to bundle local services with mixed-use CPE should not raise any jurisdictional issues not already addressed when the unbundling rules were originally promulgated. Precluding states from prohibiting such bundling by CLECs is no different jurisdictionally from precluding states from allowing such bundling by ILECs. To the extent that the Commission intends to foster competition in the marketing of mixed-use CPE by permitting bundling, state prohibition of the bundling of CPE with local service would frustrate federal goals and thus should be preemptible. See CCIA, 693 F.2d at 214-17.

interexchange and local services. Under the rules that MCI WorldCom is advocating, ILEC long distance affiliates would be able to bundle CPE with interexchange services, just as unaffiliated IXCs may do. The only difference that MCI WorldCom proposes is that ILEC long distance affiliates could not add local service to the bundle, whereas unaffiliated IXCs would be allowed to do so. For the reasons discussed above, the ILECs' dominance of the local service market would make such bundled offerings too risky for the viability of incipient local service competition and the development of joint service competition.

Moreover, because of such dominance, a prohibition of such bundling on the part of ILEC affiliates but not by IXCs would not disadvantage the ILEC affiliates or otherwise harm competition. Assuming, without conceding, that ILEC affiliates may bundle long distance and local services,[54] the high margins in both services, discussed above, provide a large monopoly funding pool to subsidize large discounts. ILEC affiliates can therefore well afford to offer local and long distance services at a bundled price, plus separately priced CPE, for a total price that compares favorably with the price that an IXC can afford to charge for a bundle including all three products.

Since IXCs have no similar monopoly subsidy pool, they can

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[54] The Further Notice, at ¶ 30, notes that the Commission is not considering in this proceeding the jurisdictional issues posed by the possible bundling of interexchange and local services.

only afford to offer discounts based on actual cost savings, which are typically not as significant as the ILEC affiliates' subsidy pools. Thus, IXCs need to be able to bundle CPE with their packages of long distance and local services, simply to make the playing field somewhat more level with ILEC affiliates offering bundles of long distance and local services with separately priced CPE. If ILEC affiliates were permitted to add CPE to their bundled service offerings, their advantage over the IXCs would be even greater. As it is, the addition of CPE to the IXCs' service bundles would not make up for the ILEC affiliates' subsidy advantages, since CPE does not represent a significant portion of a typical customer's telecommunications total usage costs.[55]

MCI WorldCom's position, of course, is based on the current absence of local and access service competition. Ultimately, that situation may change, which would require a review of the CPE unbundling rules applicable to the ILECs and their affiliates. In the event that the Commission is satisfied that substantial local and access service competition has developed, putting competitive carriers on a more even footing with the ILECs and their affiliates, it should commence a proceeding to

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[55] As IDCMA has pointed out, CPE constitutes a relatively small share of the total cost of a typical package of telecommunications services and equipment. See IDCMA Comments at 41. (Following the practice in the Further Notice, the comments cited herein are parties' comments in these dockets in response to the Interexchange Notice).

review the unbundling rules again with a view toward total elimination once they are shown to be no longer necessary in any market.

II. IXCS SHOULD BE ALLOWED TO BUNDLE INTERSTATE AND JURISDICTIONALLY MIXED ENHANCED SERVICES WITH THEIR INTEREXCHANGE SERVICES

A. The Bundling Regime for Interstate and Jurisdictionally Mixed Enhanced Services Should Mimic the Regime Proposed Above For CPE

The Further Notice raises the same issues as to enhanced service bundling as it does for CPE bundling. For the same economic and market-based reasons as set forth above for CPE, MCI WorldCom believes that IXCs should be allowed to bundle interstate and jurisdictionally mixed enhanced (or "information") services with their interstate, interexchange basic (or "telecommunications") services.[56] Indeed, the case for such a result is even stronger for enhanced services than it is for CPE, since the Commission never promulgated a strict unbundling rule for enhanced services.[57] There is no reason to treat enhanced services any differently from CPE with respect to the unbundling

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[56] See Further Notice at ¶ 35.

[57] Indeed, MCI WorldCom cannot find in Computer II an explicit prohibition against the offering of bundled packages of basic and enhanced services (other than in the case of the pre-divestiture AT&T and GTE), even by other facilities-based carriers, as long as the carrier does not tariff the enhanced service and offers the telecommunications portion of any service bundle separately in addition to the bundled offering.

rules.[58]

If anything, the enhanced service industry is even more competitive and fragmented, and there are even lower barriers to entry, than in the case of CPE manufacturing and distribution.[59] As the Further Notice points out, the Non-Accounting Safeguards Order confirmed that the information services market is "fully competitive,"[60] and no party has sought reconsideration of that finding or otherwise questioned it. The possibility of any competitive harm resulting from the bundling of interexchange basic services and interstate and jurisdictionally mixed enhanced services is therefore even lower than in the case of CPE/interexchange service bundling.

Contrary to the assertions of some parties, IXCs do not have the ability to discriminate or price their interexchange basic services unreasonably.[61] If an IXC were to condition the availability of an interexchange basic service on the purchase of an enhanced service, customers would have a wide range of other choices for both services. The only leverage that the IXC could bring to bear in such a situation would be whatever leverage could be derived from the superior value and quality of its

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[58] See Further Notice at ¶ 37.

[59] See AT&T Comments at 29.

[60] Further Notice at ¶ 36, citing Non-Accounting Safeguards Order at 136, 11 FCC Rcd at 21971.

[61] See Further Notice at ¶ 36.

interexchange basic and enhanced services, considered separately.

As in the case of CPE bundling, BOCs and other ILECs should not be allowed to bundle interstate or jurisdictionally mixed enhanced services with their local services. The ILECs' continuing dominance in local services could cause distortions in the enhanced service market and stifle the development of local competition, for all of the same reasons that bundling mixed-use CPE with ILEC local services would harm competition in CPE and hold back the development of local service competition, as discussed above. Indeed, the threat of anticompetitive cross-subsidization is even greater in the case of enhanced service bundling than in the case of CPE bundling, since there is so much operational overlap between the provision of regulated and enhanced services. That overlap facilitates the type of cost misallocation that is necessary for cross-subsidization.

Similarly, while BOC and other ILEC long distance affiliates should be free to offer bundles of interstate or jurisdictionally mixed enhanced services and interstate basic services, they should not be allowed to include local exchange services in such bundles. Such bundling would not only harm competition in enhanced services, but it would also stifle the emerging competition in joint offerings of interexchange and local basic services. The problem of cross-subsidization, aggravated by the difficulty of overseeing the ILECs' imputation of access costs where CPE is offered as part of a bundle of ILEC long distance

and local services, would be magnified if enhanced services could also be added to such bundles. The more complex the ILEC affiliate bundle, the more likely it is that a failure to impute by the ILEC affiliate will go undetected. For the same reasons as in the case of CPE bundling, allowing unaffiliated IXCs to bundle long distance, local and enhanced services, while prohibiting ILEC affiliates from offering such bundles, would not disadvantage the latter in the marketplace, nor would such a regime harm competition. Indeed, such a bundling regime is necessary to help level the playing field in the joint offering of local and long distance services and would thereby facilitate the development of competition.

Finally, CLECs should be allowed to bundle their local services with interstate and jurisdictionally mixed enhanced services, for all of the same reasons that CLECs should be allowed to bundle mixed-use CPE with their local services, as discussed above. Allowing CLECs to bundle local and enhanced services, while prohibiting ILECs from offering such bundles, would not disadvantage the latter in the marketplace, nor would such a regime harm competition. As in the case of CPE bundling, the Commission should review the enhanced service unbundling rules applicable to ILECs and their affiliates if workable competition develops in the local and access service markets.

B. The Commission Should Clarify the Nature of the Bundling to be Allowed for Enhanced Services

The Further Notice also reveals a nomenclature problem with respect to the bundling restriction applicable to enhanced services that should be cleared up by the Commission. The Further Notice points out that non-facilities-based BOC Section 272 affiliates (and, presumably, any other non-facilities-based interexchange service provider) already may bundle interstate, interLATA information services with their interexchange telecommunications services and may offer such a bundle even if they are facilities-based carriers, as long as the telecommunications portion of the bundle is also offered on an unbundled, separately tariffed basis.[62] Thus, in some sense, enhanced service bundling is allowed under the current requirements.

As the Commission explained in the Non-Accounting Safeguards Order:

> Under our definition of "interLATA information service," ... such service must include a bundled interLATA telecommunications element. Hence, to prohibit a BOC affiliate from bundling interLATA telecommunications and information services would effectively prevent the BOCs from offering any interLATA information services, a result clearly not contemplated by the statute.[63]

The "bundling" that was held to be permitted there thus is simply the inherent bundling of a telecommunications service and

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[62] Further Notice at ¶ 36.

[63] See Non-Accounting Safeguards Order at ¶ 136.

information processing that is necessary to offer any information (or enhanced) service. In that sense, all information/enhanced services are "bundled" services. Accordingly, it was something of a misnomer for the Commission to speak of "bundling interLATA telecommunications and information services"[64] in the quoted discussion, since there is no underlying information "service;" rather, there is only an underlying telecommunications service and any of three types of information processing.[65] To permit BOC Section 272 affiliates, or any IXC, for that matter, to "bundle" interLATA information services in that sense is simply to permit them to provide information services on a interLATA basis.

It is not entirely clear from the Further Notice whether the Commission proposes to allow a greater degree of enhanced service bundling than is already permitted. In any event, whatever the scope of the bundling that was intended to be permitted in the Non-Accounting Safeguards Order and the bundling that is proposed in the Further Notice, MCI WorldCom suggests that IXCs should be permitted a greater degree of enhanced service bundling than simply the bundling that is inherent in the provision of any interLATA enhanced service. IXCs should also be permitted to bundle interexchange enhanced services with other interexchange basic services -- i.e., interexchange services other than the

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[64] Non-Accounting Safeguards Order at ¶ 136.

[65] See 47 C.F.R. § 64.702(a).

service that underlies the enhanced service itself.

For example, interexchange voice mail service involves the "bundling" of interexchange transport and the use of a computer "mailbox." IXCs, including BOC Section 272 affiliates (once the BOC has in-region interLATA authority) and ILEC affiliates, should obviously be allowed to continue providing interexchange voice mail services. In addition, however, all such carriers should also be permitted to offer interexchange voice mail service on a bundled basis with other, unrelated interexchange services. The same economic and market factors that apply to the offering of a "bundled" voice mail service also preclude any significant risk to competition from the bundling of interexchange voice mail, or any other enhanced, service with any other interexchange basic service. Again, the only restrictions should be in the case of ILEC affiliates that want to add local services to the bundle.

As in the case of CPE bundling, the rules proposed in these comments should not raise any significant jurisdictional issues. The Commission clearly has jurisdiction over interstate and jurisdictionally mixed enhanced services.[66] Whether or not inconsistent state unbundling rules for the intrastate portion of jurisdictionally mixed enhanced services could be preempted, there is no reason why the unbundling rules proposed here for the

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[66] People of the State of California v. FCC, 39 F.3d 919, 931-33 (9th Cir. 1994).

Commission as to interstate and jurisdictionally mixed enhanced services, including permission for CLECs to bundle interstate and jurisdictionally mixed enhanced services with local regulated services, should not be valid.[67]

III. OTHER ISSUES

A. There is no Need to Require Carriers to Offer the Basic Service Portion of a Bundled Offering Separately on an Unbundled, Tariffed Basis

The Further Notice raises a variety of issues that are implicated in any revision of the unbundling rules, including whether the basic service portion of a bundled offering should still be offered separately on an unbundled, tariffed basis if the rules are eliminated.[68] The suggested reason for such a requirement is that it would ensure that consumers would be able to order basic transmission only, if they did not want everything in the bundled offering.

The first answer to this question is that, if the

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[67] The Further Notice, at ¶¶ 23, 38, also asks whether modification of the unbundling rules would adversely affect competition in international services. MCI WorldCom does not believe that bundling raises any issues in the international sphere that are any different from the domestic markets discussed above. Thus, ILEC long distance affiliates should not be permitted to include CPE or enhanced services with bundled offerings of local and international interexchange services, but there should be no other restrictions on the bundling of CPE or enhanced services with international and other services.

[68] Further Notice at ¶ 21. The Further Notice only mentions this issue with respect to CPE bundling, but MCI WorldCom will address it for enhanced service bundling as well.

Commission's Detariffing Order is ultimately upheld on appeal, the issue will be moot. If IXCs may not tariff any service, or are not required to tariff certain categories of interexchange services, it would be inconsistent and irrational to require the tariffing of the basic service portion of bundled offerings. Secondly, if the tariffing of interexchange services continues, this issue will still be moot in many situations, since, as discussed above, the most practical way to bundle is simply to offer a discount off the tariffed rate for an interexchange service. Thus, in the typical situation, the basic service portion of the bundled offering would be tariffed on an unbundled basis, as a matter of course.

Thirdly, even aside from those possible situations, where IXCs continue to file tariffs and bundling is carried out in a fashion that does not involve the tariffing of the basic service portion of a bundled offering on an unbundled basis, it follows from the rationale for the elimination of the unbundling rules, as discussed above, that it should not be necessary to require that the basic service portion of bundled offerings always be separately offered under tariff. The intense competition that characterizes the interexchange and enhanced service and CPE markets ensures that consumers will have choices of bundled and unbundled services and products at competitive prices. Thus, the economic rationale for allowing the bundling of CPE and enhanced services with interexchange basic services equally supports the

absence of an unbundling requirement.

The only exception would be in the situation where the Commission decided, notwithstanding the anticompetitive risks, to allow ILEC long distance affiliates to bundle interd interstate, interexchange portion of any bundled offering separately under tariff. Such tariffing is crucial to any visibility into the ILEC's imputation of access costs and thus the only basis for any hope of curbing predation through the use of such bundling.[69] The unique market advantages conferred by the inclusion of ILEC monopoly local service in an ILEC affiliate bundle, discussed above, thus necessitate a unique tariffing requirement for the basic service portion of any such bundles, if such bundles are permitted at all.

It should be noted that such tariffing would only offer minimal protection, at best, in the case of ILEC bundling, since tariffing would not prevent the use of bundling to accomplish strategic pricing targeted at favored large customers, as discussed above. The Commission should therefore not think of an unbundled tariffing requirement as an appropriate regulatory

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[69] Presumably, the local service portion of any such bundles would also be offered separately under tariff, since local service is a monopoly or quasi-monopoly service and will be so for the foreseeable future, but this Commission probably could not require such tariffing. This Commission's lack of direct authority to require the separate tariffing of the local service portion of bundled offerings is another reason not to permit the bundling by ILECs of local services with mixed-use CPE and interstate or jurisdictionally mixed enhanced services.

trade-off for elimination of the unbundling requirements for ILECs.

B. Allocation of Revenues for USF Purposes Should Not Raise Any Significant Obstacles to Modification of the Unbundling Rules

The Further Notice raises a related point concerning the allocation of revenues from bundled offerings for universal service fund (USF) contribution purposes.[70] For the most part, assuming that IXCs continue to file tariffs, that should not be a problem in most cases. As discussed above, the charge for a typical bundled offering will simply be the sum of a stated discount off the tariffed rate for the basic service portion of the bundle plus the contractual charge for the CPE. The USF contribution for such a bundle would be the discounted charge for the volume of service used by a particular customer. If the bundle were offered in a different format, some allocation might have to be performed. In that case, MCI WorldCom suggests that carriers be permitted to use any reasonable allocation method and be prepared to defend such allocations in an audit. In any event, the USF revenue allocation tail should not wag the competitive bundling dog.

C. Modification of the Unbundling Rules Should Not Affect the Part 68 Rules or the "All-Carrier Rule"

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[70] Further Notice at ¶ 18.

The Further Notice also seeks comment on whether modification of the unbundling rules would have any impact on the Commission's Part 68 Rules and, in particular, the "demarcation point" between telephone company communications facilities and terminal equipment, or on the Commission's "all-carrier" rule in Section 64.702(d)(2). The all-carrier rule requires that carriers owning basic transmission facilities disclose to the public all information relating to network design "insofar as such information affects either intercarrier interconnection or the manner in which interconnected CPE operates."[71] The answer in both cases is clearly that modification of the unbundling rules would have no effect on these requirements.

First, there is nothing about bundling that ought to affect or create any confusion about what constitutes network transmission facilities and what is terminal equipment. The Commission, in effect, has already crossed this line conceptually in the Detariffing Order, whether or not that ruling is sustained on appeal. There, the Commission detariffed interexchange rates in order to subject IXCs "to the same incentives and rewards that firms in other competitive markets confront."[72] Thus, the Commission implicitly determined that there was no need to differentiate communications services and facilities from CPE, a

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[71] Further Notice at ¶ 20 (quoting Computer II Recon. Order, 84 FCC 2d at 82-83).

[72] Detariffing Order at ¶ 4.

typical unregulated competitive market, through the tariffing process. If detariffing would not create any confusion as to the demarcation point between communications service facilities and terminal equipment, there is no reason that bundling the two would cause any such confusion, since tariffing obviously is not the litmus test for such a determination. The highly technical definitions in Part 68 should not depend on whether something is tariffed or not.

Similarly, something as seemingly dispensable (at least from the Commission's policy perspective) as tariffing should not have any impact on the all-carrier rule. The highly technical data that is required for network interconnection or CPE compatibility could hardly be determined or affected by the bundling or unbundling of basic services and CPE. Thus, for example, any carrier offering a bundle of service and CPE must still make public the data that is necessary for other manufacturers to build CPE that can be used with the basic service portion of the bundle, whether or not that portion is separately tariffed. Making the bundled offering cannot change that obligation. Thus, partial elimination of the unbundling rules should not undermine any carrier's other obligations under the Commission's Rules.

CONCLUSION

The CPE and enhanced service unbundling rules should be modified to the extent proposed in these comments. The

unbundling rules should be lifted for interexchange and competitive local services, where bundling would increase consumer welfare, but should be retained for ILEC local services and ILEC affiliate bundled offerings including local services, where bundling would stifle the development of local service competition and thus harm consumer welfare.

Respectfully submitted,

MCI WORLDCOM, INC.

By: Frank W. Krogh

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Its Attorneys

Dated: November 23, 1998

ATTACHMENT A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Competitive Telecommunications Association, Florida Competitive Carriers Association, and Southeastern Competitive Carriers Association	)	
	)	CC Docket No. 98-39
Petition On Defining Certain Incumbent LEC Affiliates As Successors, Assigns, or Comparable Carriers Under Section 251(h) of the Communications Act	)	

COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

MCI TELECOMMUNICATIONS CORPORATION

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Dated: May 1, 1998

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SUMMARY

Because the ILECs' local service affiliates are not intended to compete with the ILECs, such affiliates are the antithesis of competitive local exchange carriers (CLECs), and must be treated in every way like ILECs. Grant of the Comptel Petition is necessary to prevent the opening of a loophole to Section 251 that will, in time, swallow the rule if left unchecked.

The establishment of ostensible CLECs by ILECs facilitates a wide variety of anticompetitive strategies, including the ILECs' avoidance of their obligations under Section 251(c)(4), and increases the risk of anticompetitive pricing strategies. Moreover, the discrimination that is facilitated by the use of such affiliates is precisely the type of exploitation of bottleneck power that requires dominant treatment of ILECs' local services. Unless the Comptel Petition is granted, the ILECs and their affiliates will be able to exploit the ILECs' bottleneck monopoly to stifle incipient competition and deny customers the benefits of such competition.

The basic problem is that the ILEC and its local service affiliate will not be operating independently of one another. Instead, they will be closely coordinating their efforts in the same manner as a single entity. In essence, the local affiliates will be the alter egos of their affiliated ILECs. The ILECs and their affiliates will be able to exploit the ILEC's bottleneck monopoly by migrating its favored high volume customers to the affiliate, which can become the preferred provider of new,

innovative local services selectively offered to the favored customers. If such affiliates are treated as nondominant CLECs, they will be under no obligation to provide these state-of-the-art services or reasonably priced UNEs comprising those services to other CLECs. As a result, other CLECs and residential and small business subscribers will be stuck with the ILEC's increasingly outmoded and inadequate network services and UNEs at the current excessive rates.

The Michigan and Texas Commissions both recognized the anti-competitive dangers posed by ILEC local service affiliates and their potential to undermine the development of local competition. Both Commissions denied GTE's "competitive" local service affiliate permission to provide local service in GTE's incumbent service areas.

Unless the Commission rules that, under Section 251(h), an ILEC affiliated local service provider is subject to the Section 251(c) obligations of ILECs, ILEC local service affiliates not only will facilitate ILECs' avoidance of their Section 251 obligations, but also will undermine the nondiscrimination provisions contained in CLEC interconnection agreements. Most of those agreements typically provide that the ILEC will not discriminate in ordering, provisioning repair, and maintenance between its own customers and those of the CLEC reselling its service. Most do not, however, address discrimination in favor of the ILEC's own local service affiliates and their customers. Accordingly, the CompTel Petition should be granted.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Competitive Telecommunications Association, Florida Competitive Carriers Association, and Southeastern Competitive Carriers Association	)	
Petition On Defining Certain Incumbent LEC Affiliates As Successors, Assigns, or Comparable Carriers Under Section 251(h) of the Communications Act	)	CC Docket No. 98-39

COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

MCI Telecommunications Corporation (MCI), by its undersigned attorneys, hereby responds to the Public Notice requesting comments on the above-captioned Petition for Declaratory Ruling or, in the Alternative, for Rulemaking filed by the Competitive Telecommunications Association, et al. (CompTel Petition).[1] That Petition addresses the appropriate legal and regulatory status of incumbent local exchange carrier (ILEC) affiliates providing local exchange and exchange access services in the ILEC's service area. As explained below, because the ILECs' local service affiliates are not intended to compete with the ILECs, but, rather, to coordinate their operations closely with the ILECs, such affiliates are the antithesis of competitive local exchange carriers (CLECs). So that such ILEC "CLEC" affiliates do not undermine the development of local competition, they must be treated in every way like ILECs.

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[1] Commission Seeks Comment on Petition Regarding Regulatory Treatment of Affiliates of ILECs, CC Docket No. 98-39 DA 98-627 (released April 1, 1998).

A. Introduction

CompTel et al. request that the Commission issue a declaratory ruling that an ILEC affiliate that operates under the same or similar brand name and provides wireline local exchange or exchange access service within the ILEC's region will be considered a "successor or assign" of the ILEC under Section 251(h)(1)(B)(ii) of the Communications Act. In the alternative, CompTel et al. request that the Commission propose a rule establishing a rebuttable presumption that an ILEC affiliate that provides wireline local exchange or exchange access service within the ILEC's service area under the same or a similar brand name is a "comparable" carrier under Section 251(h)(2). In either case, CompTel et al. request that the affiliate itself be subject to the obligations of ILECs under Section 251(c) as a result of such status under Section 251(h) and be treated as a "dominant carrier" for the provision of interstate services.

Using BellSouth BSE as an example, CompTel et al. discuss the range of services that ILEC "competitive" local service affiliates are intended to provide and the various types of resources that ILECs are providing to those affiliates. CompTel et al. also discuss the ways in which such ILEC affiliates are likely to be used to avoid the ILECs' Section 251 obligations, such as the resale obligation under Section 251(c)(4). As explained in the Petition, such transfers of resources and customer base to an affiliate providing the same services as the ILEC and in the same area render such an affiliate a successor or

assign of the ILEC under the ordinary meaning of those terms in corporate law. The same resource transfers and identical nature of the ILEC and its affiliate also justify a rule that such an ILEC local service affiliate is a comparable carrier under Section 251(h)(2). Such a successor or assign, or comparable carrier, should also be treated as a dominant carrier for all of the same reasons that the ILEC is treated as dominant.

B. ILEC Local Service Affiliates Operating in the ILEC's Service Area Facilitate Anticompetitive Strategies

Grant of the CompTel Petition is absolutely necessary to prevent the opening of a loophole to Section 251 that will, in time, swallow the rule if left unchecked. An ILEC's local service affiliate providing the same services in the same area as the ILEC -- whether through resale or the use of its own facilities -- plays the same role, economically, as the ILEC itself and thus can no more be considered a non-incumbent carrier than a new ILEC exchange that is installed to provide service to a new housing development or office complex. The coordination and market division that characterize ILEC dealings with their local service affiliates guarantee that such affiliates will be no more than arms of the ILEC and must be regulated accordingly.

As CompTel et al. point out, the establishment of ostensible CLECs by ILECs facilitates a wide variety of anticompetitive strategies. The illustration discussed in the Petition is the use of the ILEC CLEC gambit to avoid an ILEC's obligation under Section 251(c)(4) to offer at a wholesale rate for resale any

service it offers at retail, thus removing a significant competitive check on the ILEC's pricing.

This is hardly speculation, since the Connecticut Department of Public Utility Control (DPUC) authorized precisely such an end run around Section 251(c)(4) in approving Southern New England Telephone Company's (SNET's) reorganization plan. In granting such approval, the DPUC upheld one of the avowed purposes of the plan, which was to avoid SNET's Section 251(c)(4) obligation.[2] Because SNET America Inc. (SAI) would inherit SNET's retail operations and customers and would provide all retail services in SNET's place, the DPUC concluded that the resale duties of Section 251(c)(4) would no longer apply to SNET, while Section 251 would not be applicable at all to SAI, since it is not an ILEC.[3] Thus, competitors are deprived of the opportunity to purchase at wholesale the service packages and promotions that are offered by SAI but not by SNET, thereby removing an important competitive safeguard on SNET/SAI's behavior.

Setting up new local service affiliates increases the risk that ILECs will carry out other anticompetitive pricing strategies as well, given the leeway that state commissions have

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[2] See Decision at 13, DPUC Investigation of the Southern New England Telephone Company Affiliate Matters Associated with the Implementation of the Public Act 94-83, Docket No. 94-10-05 (Conn. DPUC June 25, 1997)(SNET "contends that the most notable market disadvantage presented to the [SNET] Telco is the requirement that it provide, at wholesale, essentially all of its retail telecommunications services including discount plans, service packages and promotions, at a [discount calculated pursuant to the 1996 Act]").

[3] Id. at 52-54.

in setting prices for unbundled network elements (UNEs). For example, price squeezes can be more easily imposed by having the ILEC provide overpriced UNEs, while its local service affiliate selectively provides the retail services using such UNEs at rates that do not reflect the full cost of the UNEs charged by the ILEC. If the local service affiliate is regulated as a nondominant carrier, there will be no effective regulatory check on its retail rates or the imputation of input costs. Thus, it will be able to target special offers to the large customers that are most susceptible to competition on a selective basis in order to "pick off" would-be competitors -- who may need the ILEC's overpriced UNEs -- and thereby deter competitive investment and suppress the development of local competition. Thus, by splitting up the provision of different categories of offerings between the ILEC and its lightly regulated local service affiliate in such ways, the "ILEC CLEC" gambit can be used to eviscerate the goals of Section 251 and the development of local competition.

The basic problem illustrated by the SNET reorganization and other variations on the ILEC CLEC strategy is that the ILEC and its local service affiliate will not be operating independently of one another but, rather, will be closely coordinating their efforts in the same manner as a single entity. As the Michigan Public Service Commission found, in reviewing the request of Ameritech Communications, Inc. (ACI) for certification to provide local service in Ameritech Michigan's service area, ACI was not

intended to compete with Ameritech Michigan, but, rather, to provide a retail outlet for Ameritech's bundled service packages.[4] That is true of any ILEC local service affiliate, including, by its own admission, BellSouth BSE, the local service affiliate mentioned in the CompTel Petition.[5] Such entities thus are "CLECs" without the "C;" they are simply alter egos of their affiliated ILECs.

Since ILECs and their local service affiliates are not intended to operate independently, they can exploit the ILEC's bottleneck monopoly by migrating its favored high-volume customers to the affiliate, which can become the preferred provider of new, innovative local services selectively offered to the favored customers, while the ILEC's local services are allowed to degrade and become technological backwaters serving residential users and other CLECs. Because the ILECs will enjoy continued monopoly, or at least highly dominant, status for the foreseeable future, they are under no competitive pressures to

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[4] Order Approving Application at 18, In the matter of the application of Ameritech Communications, Inc., for a license to provide basic local exchange service in Ameritech Michigan and GTE North Incorporated exchanges in Michigan, Case No. U-11053 (Mich. PSC Aug. 28, 1996).

[5] See CompTel Petition at 4. BellSouth's own witness testified that BellSouth BSE, "[does not] want to really compete with" BellSouth's incumbent local service affiliates; rather, its "services will be complementary to" BellSouth's incumbent services. See Testimony of Robert C. Scheye, Transcript of Testimony and Proceedings at 17, Application of BellSouth BSE, Inc. for a Certificate of Public Convenience and Necessity to Provide Local Exchange Telecommunications Services, Docket No. 97-361-C, Hearing No. 9703 (S.Car. PSC Nov. 5, 1997), attached hereto as Exhibit A.

invest in the incumbent local network. Meanwhile, if the ILEC's local service affiliates are not treated as incumbents, they will be under no legal obligation to provide their retail services at wholesale rates for resale or reasonably priced UNEs comprising those services to other CLECs.

Thus, other CLECs and residential and small business subscribers will be stuck with the ILEC's increasingly outmoded and inadequate network services and UNEs at the current excessive rates, while the ILEC's favored large customers will have access to state-of-the-art services from its local service affiliate. As noted above, if such affiliates are treated as nondominant CLECs, they will be free to offer such services at preferable rates on a selective basis to the larger customers that are the most susceptible to competing offers, thereby stifling incipient competition. Thus, no customer category, not even the larger customers, will enjoy the full benefits of competition.

As discussed above, the ILEC's excessively priced UNEs add to the price squeeze that can be carried out through selective retail price reductions by the ILEC's local service affiliate, but it should be noted that such discriminatory targeting by the affiliate will be possible, and effective, in suppressing competition whether or not the ILECs' UNEs are reasonably priced. The use of local service affiliates therefore affords ILECs a wide array of anticompetitive options, which can be used in tandem or individually.

That the ILECs will, in fact, use local service affiliates

to make special service offers not available from the ILECs themselves is shown by Ameritech's statement that if the Bell Operating Companies' (BOCs') Section 272 affiliates were permitted to provide local services, those affiliates would develop new services "that would not be available if the affiliate were limited to the local exchange services ... offered by the BOC itself."[6] In other words, the affiliate would be offering local services that would not be available through the BOC, and thus would not be available to competitors. There is no reason to believe that the same would not be the case for any ILEC's local service affiliate. Such market segmentation, as promised by Ameritech and carried out under the SNET reorganization, guarantees constant, close coordination between the ILEC and its local service affiliate at every step of product development, marketing and sales in order not to trip over each other, unlike the relationship between the ILEC and a true CLEC.

As these examples demonstrate, ILECs could use their local service affiliates to avoid their Section 251 and 252 obligations. In recognition of such dangers, the Texas Public Utilities Commission denied GTE Communications Corporation (GTE-CC), GTE's CLEC affiliate, a certificate of operating authority to provide local services in GTE's incumbent service areas.[7] One

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[6] Ameritech Comments at 16-17, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149 (April 2, 1997).

[7] Order, Application of GTE Communications Corporation for a Certificate of Operating Authority, Docket No. 16495, SOAH

of the Commissioners explained that such certification raised concerns as to

> whether it's anti-competitive and whether it circumvents regulation and whether or not it basically is counterproductive to opening these markets in a fair way to everybody.
>
> ....
>
> And we have on these affiliate issues said that we're not going to allow these 100 percent related affiliates to circumvent the requirements of our statute and the [1996 Act] for what these companies have to do. ... [I]t would make a mockery of the whole regulatory and legal scheme.[8]

Similarly, the Michigan Public Service Commission granted GTE-CC local service authority only in areas where Ameritech is the ILEC, adopting the position that GTE-CC "not be permitted to provide basic local exchange service in GTE North's exchanges until those exchanges are irreversibly open to competition."[9]

Docket No. 473-96-1803 (Tex. PUC Nov. 20, 1997).

[8] Comments of Commissioner Walsh, In the Matter of the Open Meeting to Consider Docket and/or Project Nos. 16495, et al., (Tex. PUC Oct. 22, 1997), at 94, 96, attached hereto as Exhibit B. Similarly, Pacific Bell Communications (PB Com), an affiliate of Pacific Bell, withdrew its application to provide local service in Pacific Bell's service area after consumer advocates and competitive carriers objected that such an arrangement could provide an opportunity for preferential treatment of PB Com by Pacific Bell. See Proposed Decision of ALJ Walker at 20-21, Application of Pacific Bell Communications for a Certificate of Public Convenience and Necessity to Provide InterLATA, IntraLATA and Local Exchange Telecommunications Services Within the State of California, Application 96-03-007 (Cal. PUC May 5, 1997), withdrawn by Assigned Commissioner's Ruling (Oct. 15, 1997).

[9] Opinion and Order at 3, In the matter of the application of GTE Communications Corporation for the issuance of a license to provide and resell basic local exchange service in Ameritech Michigan and GTE North Incorporated exchanges in the State of Michigan and related approvals, Docket No. U-11440

In addition to the strategies discussed above, an affiliate could request new UNEs from the ILEC configured for the affiliate's unique needs that are not useful to other CLECs, which may already have their own facilities. Ostensibly, such UNEs would be available to all on a nondiscriminatory basis, but, since only the ILEC's affiliate would want them, there would be no practical check on the ILEC's preferential development or pricing of UNEs or other discrimination in favor of the affiliate in the provision of such UNEs. Such favoritism would be magnified if the ILEC were to provide operating, installation and maintenance services for the specially configured UNEs.

Given the detailed, technical nature of UNEs, it would be extremely difficult and time-consuming to articulate and enforce rules against such preferential development. The Commission would have to expend considerable resources in the day-to-day monitoring of ILEC product development and the local service affiliate's operations, as well as other CLECs' operations, that would be necessary to ensure that UNEs were not being developed that would be of more use to the ILEC's affiliate than to other CLECs. Such detailed, intrusive regulation, of course is precisely the sort of function that the Commission is trying to

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(Mich. PSC Dec. 12, 1997), attached hereto as Exhibit C. This does not mean that this Commission can leave this issue entirely to the states. The states differ widely in their approaches, with some states granting full authority to ILECs to operate local service affiliates in their own service areas. See CompTel Petition at 4. Given all of the ways in which use of such affiliates enables ILECs to undermine the local competition regime established by Sections 251 and 252 of the Act, this issue requires immediate remedial action by this Commission.

avoid, thus making it extremely unlikely that this type of discrimination would ever be effectively monitored or prevented.

An ILEC's local service affiliate could also coordinate with the ILEC in the construction of the affiliate's own facilities. The combination of unique UNEs from the ILEC with its own new facilities would make it more feasible for the affiliate to provide new local services not available from the ILEC, thus furthering the anticompetitive discrimination discussed above.

C. ILEC Local Service Affiliates Will Undermine Nondiscrimination Provisions in Interconnection Agreements

Finally, the ILEC CLEC strategy will nullify the nondiscrimination protections laboriously negotiated in the real CLECs' (i.e., CLECs not affiliated with ILECs) interconnection agreements with the ILECs. Those agreements typically provide that the ILEC will not discriminate in ordering, provisioning, repair and maintenance between its own customers and those of the CLEC reselling its services. Most of those agreements, however, do not address discrimination in favor of the ILEC's own local service affiliate. Thus, there are few agreements that require that the ILEC provide ordering, provisioning, repair and maintenance to a CLEC and the CLEC's customers on terms and conditions and at intervals no less favorable than to its own affiliate and its affiliate's customers. Once an ILEC sets up its own local service affiliate and begins migrating its favored customers to the affiliate, there is nothing in many interconnection agreements to stop the ILEC from favoring its own

affiliate's customers over other CLECs' customers.[10]

The impact of the absence of effective nondiscrimination provisions in interconnection agreements is aggravated by the ILECs' failure to provide equal access to Operations Support Systems (OSS). No Bell Operating Company (BOC) or other ILEC has fully implemented nondiscriminatory access to OSS for ordering, provisioning, maintenance and repair and billing for local service resale or UNEs, in spite of the January 1, 1997 deadline set in the Local Competition Order for such implementation.[11] The corrosive effects of such discrimination are aggravated in a situation where an ILEC favors not only its own customers but also its own affiliate's customers over all other CLECs and their customers.

Again, the problem of unequal access to OSS is not speculative. In Connecticut, SAI -- SNET's retail local service

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[10] Real CLECs and other entities that are injured by such ILEC discrimination in favor of the ILEC's affiliate would still have statutory remedies, but since the obligations of ILECs under Section 251 must, in the first instance, be implemented through agreements negotiated under Sections 251 and 252, the ILECs' avoidance of the nondiscrimination requirements in those agreements through the use of local service affiliates will undermine an important vehicle for the development of local competition established in Sections 251 and 252.

[11] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, at ¶ 525 (1996), aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC, 117 F.3d 1068 (8th Cir. 1997), vacated in part on reh'g sub nom. Iowa Utilities Bd. v. FCC, 120 F.3d 753, further vacated in part sub nom. California Public Utilities Comm'n v. FCC, 124 F.3d 934, writ of mandamus issued sub nom. Iowa Utilities Bd. v. FCC, No. 96-3321 (8th Cir. Jan. 22, 1998), petition for cert. granted, Nos. 97-826, et al. (U.S. Jan. 26, 1998)(subsequent history omitted).

provider -- is locking up local service subscribers in advance of a statewide local service balloting process. SAI will be providing local service largely by reselling SNET's services, whereas MCI and other competitors may be entering the market through the use of UNEs. SNET, however, has OSS available only for resale orders, not for services provided through UNEs, thus providing SAI a distinct advantage over facilities-based CLECs. Such favoritism violates not only Section 251 but also Section 202(a) of the Act and provides an early warning of the behavior that can be expected from other ILECs with local service affiliates if the CompTel Petition is not granted.

D. ILECs Should Not be Permitted to Avoid Their Statutory Obligations Through the Use of Local Service Affiliates

Given the ways in which ILECs have used and will continue to use their local service affiliates to avoid their Sections 202(a), 251 and 252 obligations if left unchecked, there is ample precedent for ignoring the nominal distinction between the two entities and treating the affiliate as the undifferentiated operation of the ILEC that it really is. The Supreme Court has "consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies." First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611, 630 (1983)(Cuba bank not permitted to avoid counterclaim of Citibank by splitting assets between two entities). Accord, Bangor Punta Operations, Inc. v. Bangor & Aroostook R.Co., 417 U.S. 703, 713 (1974); Anderson v. Abbott, 321 U.S. 349, 365

(1944) (the interposition of a corporation will not be allowed to defeat the legislative policy of the Federal Reserve Act and the National Bank Act relating to assessment of bank shareholders, whether that was the aim or only the result of the arrangement). In determining whether to disregard the corporate form, a court "must consider the importance of the use of that form in the federal statutory scheme, an inquiry that generally gives less deference to the corporate form than does the strict alter ego doctrine of state law." Leddy v. Standard Drywall Inc., 875 F.2d 383, 387 (2d Cir. 1989).

Thus, in a wide variety of circumstances, courts have disregarded the corporate form where the same is or could be used to circumvent a legislative purpose. See, e.g., United States v. Calhoon, 97 F.3d 518 (11th Cir. 1996) (for purposes of Medicare cost reporting, related organizations treated as one), cert. denied, 1997 US LEXIS 4573 (US 1997); Transcontinental Gas Pipe Line Corp. v. FERC, 998 F.2d 1313, 1321 (5th Cir. 1993) (where a company subject to the National Gas Act set up two unregulated subsidiaries to circumvent the filed rate requirements of the Act, the court held that the agency "correctly looked behind corporate forms and found that the three companies really were one."); Salomon, Inc. v. United States, 972 F.2d 837, 841 (2d Cir. 1992)("the tax consequences of an interrelated series of transactions are not to be determined by viewing each of them in isolation but by considering them together as component parts of an overall plan"); Donovan v. McKee, 845 F.2d 70, 71-72 (4th Cir.

1988) ("[T]here is no warrant in the statutory language or purpose for allowing operators to resort to such shell game maneuvers to avoid liability for black lung benefit payments ... [and thus defendants individually could not] ... avoid benefits payments simply by effecting convenient changes of the business form under which the coal mining operations are conducted."); Abdelaziz v. United States, 837 F.2d 95, 98 (2d Cir. 1988)(corporate form cannot be used to thwart congressional intent and shield store owners from consequences of committing food stamp fraud); Armco Inc. v. United States, 733 F. Supp. 1514 (C.I.T. 1990) (corporate form cannot be used to circumvent required countervailing export duties); United States v. Golden Acres, Inc., 702 F. Supp. 1097, 1107-08 (D. Del. 1988); Lowen v. Tower Asset Management, 829 F.2d 1209, 1220 (2d Cir. 1987)("Parties may not use shell-game-like maneuvers to shift fiduciary obligation to one legal entity while channeling profits from self-dealing to a separate entity under their control."); Alman v. Danin 801 F.2d 1 (1st Cir. 1986)(same).

Significantly, this principle has been applied in the context of enforcement of the Communications Act of 1934. See Capital Telephone Company, Inc. v. FCC, 498 F.2d 734, 739 (D.C. Cir. 1974)("To carry out statutory objectives, it is frequently necessary to seek out and give weight to the identity and characteristics of the controlling officers and stockholders of a corporation.... We find that substantial evidence supports the Commission's decision to pierce Capital's corporate veil in order

to carry out the statutory mandate to provide fair, efficient, and equitable distribution of radio service"); GTE v. United States, 449 F.2d 846, 855 (5th Cir. 1971) ("Where the statutory purpose could ... be easily frustrated through the use of separate corporate entities, [the FCC] is entitled to look through corporate form and treat separate entities as one and the same for purposes of regulation."); MCI Telecommunications Corp. v. O'Brien Marketing Inc., 913 F.Supp. 1536 (S.D. Fla. 1995) ("[P]iercing the corporate veil in the instant case furthers a purpose of the Communications Act; namely, preventing unreasonableness of rates and discrimination in interstate telecommunications charges.").

Thus, there is ample precedent holding that the corporate form cannot be used to frustrate Congress' intent with respect to the telecommunications field. CompTel's Petition should accordingly be granted in order that the ILECs' local service affiliates are appropriately treated as ILECs themselves when they provide service in the ILECs' service areas.

Conclusion

The close coordination that has already occurred and will occur between ILECs and their local service affiliates and the avoidance of Section 251 and other statutory obligations facilitated thereby require that such affiliates be treated as successors or assigns of the ILECs under Section 251(h)(1)(B)(ii) or comparable carriers under Section 251(h)(2). The lack of

independence and competition between them precludes any regulatory treatment of the affiliates as typical CLECs.

Moreover, the discrimination that is facilitated by the use of such affiliates is precisely the type of exploitation of bottleneck power that requires dominant treatment of ILECs' local services. The favoritism that an ILEC is able to bestow upon its affiliate and the affiliate's customers, as discussed above, depends on the ILEC's unique network resources. That the ILEC's affiliate might not own any facilities that were in place prior to passage of the 1996 Act, or any facilities at all, provides no justification for nondominant treatment of the affiliate. The exploitation of the ILEC's bottleneck power facilitated by the affiliate can only be curbed by regulation as a dominant carrier.[12] The ILECs' ratepayers are also injured by the cross-subsidies that result from the ILEC's provision of facilities and services to the affiliate that only it could use and that other carriers therefore would not want, as discussed above. Such favoritism amounts to a transfer of resources to the affiliate at less than cost. Dominant treatment is therefore also necessary to deter such cross-subsidies.

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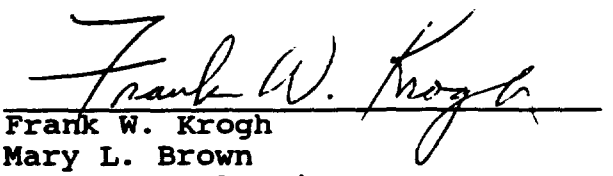
[12] The nondominant status accorded to the ILECs' interexchange services in Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace, CC Docket No. 96-149 and CC Docket No. 96-61, FCC 97-142 (released April 18, 1997), is irrelevant to this proceeding, which involves ILEC affiliates in the same local monopoly market.

Accordingly, for the reasons stated above and in the CompTel Petition, such Petition should be granted, and ILEC local service affiliates treated as ILECs under Section 251(h) and as dominant carriers in the circumstances indicated.

Respectfully submitted,

MCI TELECOMMUNICATIONS CORPORATION

By: 

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Its Attorneys

Dated: May 1, 1998

EXHIBIT A

BEFORE THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA
COLUMBIA, SOUTH CAROLINA

HEARING #9703 NOVEMBER 5, 1997 2:30 P.M

DOCKET NO. 97-361-C: BELLSOUTH BSE, INC. - Application for a Certificate of Public Convenience and Necessity to provide Local Exchange Telecommunications Services.

HEARING BEFORE:

Chairman Guy Butler, Presiding; Vice Chairman Philip T. Bradley; and Commissioners Rudolph Mitchell, Cecil A. Bowers, Warren D. Arthur, IV, and William "Bill" Saunders.

STAFF:

D. Wayne Burdett, Manager, and James M. McDaniel, and William O. Richardson, Utilities Department; F. David Butler, Esq., General Counsel; and Mary Jane Cooper, Hearing Reporter.

APPEARANCES:

Harry M. Lightsey III, Esq., and Kevin A. Hall, Esq., representing BELLSOUTH BSE, INC., Applicant.

John M.S. Hoefer, Esq., representing MCI TELECOMMUNICATIONS CORP. and MCI METRO ACCESS TRANS., Intervenor.

B. Craig Collins, Esq., representing SOUTH CAROLINA CABLE TELEVISION ASSOCIATION, Intervenor.

Francis P. Mood, Esq., and Steve A. Matthews, Esq., representing AT&T COMMUNICATIONS OF THE SOUTHERN STATES, INC., Intervenor.

Russell B. Shetterly, Esq., representing ACSI, Intervenor.

TRANSCRIPT OF TESTIMONY AND PROCEEDINGS
Volume 1 of 1

[97-361-C Volume 1 of 1]

INDEX

Q So, right now you don't have any plans to market i
under anything other than BellSouth BSE?
A That's correct, Sir.
Q OK. Is BSE going to compensate BellSouth Corporatio
for the use of the name BellSouth?
A No, Sir.
Q BellSouth BSE seeks the authority to provide loca
service and BellSouth Telecommunications local servic
here in South Carolina. Is that correct?
A In the entire state of South Carolina with th
exceptions of the area served by the independen
telephone companies with which a stipulation wa
assigned it.
Q Why does BSE want to compete in the BST service area
A We don't want to really compete with BST. We believ
our services will be complimentary to BST's service
in two ways. One area is that we plan to provid
fully packaged integrated services which would includ
local exchange service. Ultimately, long distanc
services once we're Certified to provide long distanc
- possibly entertainment services, Internet service
and wireless services. These are capabilities tha
are best done in an entity outside of BST - entitie
such as this because it's basically pulling togethe
our regulated and unregulated services. In addition,

EXHIBIT B

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
PUBLIC UTILITY COMMISSION OF TEXAS
AUSTIN, TEXAS

IN THE MATTER OF THE OPEN MEETING TO CONSIDER DOCKET AND/OR PROJECT NOS. 17525, 17942, 17878, 17705 16705, 17343, 17643, 17657 17695, 16536, 18000, 16495 17278, 17112, 16890, 16905 16906, 16938, 16939, 16940 16941, 16942, 16943, 16944 [redacted] 16946, 16947, 16948 16984, 16986, 16987, 16988 17015, 17054, 17128, 17142 17143, 17144, 17170. 17175 17176, 17177, 17181, 17182 17191, 17195, 17196, 17197 17203, 17204, 17536, 17065 17716, 17719, 17734, 17742 17748, 17754, 17769, 17631 17682, 17761, 17800, 14929 17472, 16899, 16900, 17329 17295 and 17709

OPEN MEETING
WEDNESDAY, OCTOBER 22, 1997

BE IT REMEMBERED THAT at approximately 10:00 a.m., on Wednesday, the 22nd day of October 1997, the above-entitled matter came on for hearing at the Offices of the Public Utility Commission of Texas, 7th Floor, Commissioners' Hearing Room, 1701 North Congress Avenue, Austin, Texas; before CHAIRMAN PATRICK WOOD and COMMISSIONER JUDY WALSH; and the following proceedings were reported by Lou Ray and Janine Ensley, Certified Shorthand Reporters of:

that --

COMM. WALSH: I'm concerned -- and I'm not going to come as a surprise to anybody -- but I'm concerned that where you have a corporation that has a CCN and they have all the obligations that you have an as incumbent local exchange company, both service quality, Universal Service and obligations under PURA and the FTA, that if a -- a total affiliate is granted a different certificate without those obligations, whether it's anti-competitive and whether it circumvents regulation and whether or not it basically is counterproductive to opening these markets in a fair way to everybody.

CHAIRMAN WOOD: I couldn't agree more. And in fact, I went back and reviewed the Sprint docket that was relied upon as support for what's going on here, and -- I don't know what to do about it now, but I think there's probably a problem with that order.

COMM. WALSH: We were

concerned about these issues in the Sprint docket. And we made a determination then that we believed that the public interest could be protected by putting in safeguards. If we don't believe that in this docket, then I think we have to change our policy on that.

CHAIRMAN WOOD: I'm -- I mean, I'm -- I think there are probably some legal issues that I wasn't -- none of the parties had raised at that time in that issue since it was a stipulated docket that I would think would be germane now that we've kind of had the chance to look through this.

Would you want to have a little briefing between now and next week from the parties or anything on this? I mean, it looks like it obviously was fleshed out --

COMM. WALSH: I'm open to how we move forward, and I think we -- I just didn't want to sort of decide it today without having a further look at that issue severed from the other and just get the other one moving. But I have serious

concerns about it. I'm not sure that even as a legal matter -- I guess at the outset if GTE Southwest were requesting a COA in their own territory, I don't think we could grant that as a legal matter.

CHAIRMAN WOOD: That's where I'm going on that.

COMM. WALSH: And we have on these affiliate issues said that we're not going to allow these 100 percent related affiliates to circumvent the requirements of our statute and the FTA for what these companies have to do. I mean, it would make a mockery of the whole regulatory and legal scheme. So...

CHAIRMAN WOOD: I guess -- my thought is if we could get there on a legal issue, then --

COMM. WALSH: Well --

CHAIRMAN WOOD: -- why got do it now?

COMM. WALSH: Well, I think that the statute says that you cannot have a -- that a single company can't have a COA and an SPCOA in the same territory. The

statute also says -- and the CCN stuff was already there -- the statute then says, "...in lieu of a CCN you can get a COA." And it's my considered legal opinion -- (laughter) -- for whatever that's worth that that means that a CCN holder cannot hold a COA in its own territory.

And if we follow our rationale about affiliates not being able to do what their mirror images can't do, then I could very easily say that this COA can't be granted in their own territory. And I'm willing to listen to what people have to say about that, but that's sort of where I am.

CHAIRMAN WOOD: Good.

MR. DAVIS: Would you like the parties to file briefs on the legal issue?

CHAIRMAN WOOD: Yeah. That's what I guess I'd like -- you mention that -- What was that again? In lieu of?

COMM. WALSH: Yes. The COA statute says "in lieu of a CCN." It doesn't say in addition to. And it's

EXHIBIT C

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the application of GTE COMMUNICATIONS CORPORATION for the issuance of a license to provide and resell basic local exchange service in Ameritech Michiganjs and GTE North Incorporatedjs exchanges in the State of Michigan and related approvals.	)	Case No. U-11440

At the December 12, 1997 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. John G. Strand, Chairman
Hon. John C. Shea, Commissioner
Hon. David A. Svanda, Commissioner

OPINION AND ORDER

On June 16, 1997, GTE Communications Corporation filed an application, pursuant to the Michigan Telecommunications Act, MCL 484.2101 et seq.; MSA 22.1469(101) et seq., for a license to provide basic local exchange service in the exchanges served by GTE North Incorporated and Ameritech Michigan.[1] On September 22, 1997, Administrative Law Judge Daniel E. Nickerson, Jr., (ALJ) presided over a hearing at which the testimony of witnesses

[1]GTE Card Services Incorporated, d/b/a GTE Long Distance, filed the application and subsequently changed its name to GTE Communications Corporation. GTE Communications later clarified that it was not seeking a license for exchanges served by GTE Systems of the South. Tr. 91-92.

for GTE Communications and the Commission Staff (Staff) was bound into the record without cross-examination. The record consists of 131 pages and 10 exhibits.

The parties filed briefs and reply briefs and, on November 17, 1997, the ALJ issued a Proposal of Decision (PFD) recommending that the Commission grant the application with a single modification to the conditions proposed by the Staff. On November 24, 1997, GTE Communications and the Staff filed exceptions. On December 3, 1997, both parties filed replies to exceptions.

The Michigan Telecommunications Act requires the Commission to grant a license to provide basic local exchange service if it finds that:

> (a) The applicant possesses sufficient technical, financial, and managerial resources and abilities to provide basic local exchange service to every person within the geographic area of the license.
>
> (b) The granting of a license to the applicant would not be contrary to the public interest.

MCL 484.2302(1); MSA 22.1469(302)(1).

There is no dispute among the parties that GTE Communications possesses sufficient technical, financial, and managerial resources and abilities to provide basic local exchange service to every person within the geographic area of the license. There is also no dispute that permitting GTE Communications to provide basic local exchange service in all Ameritech Michigan exchanges is not contrary to the public interest. The only dispute is whether it is contrary to the public interest at this time to permit GTE Communications to provide basic local exchange service in GTE North's exchanges.

The Staff recommends that GTE Communications not be permitted to provide basic local exchange service in GTE North's exchanges until those exchanges are irreversibly open to competition, as shown by (1) GTE North's filing of acceptable tariffs in compliance with a final, nonappealable order establishing wholesale discounts and prices for unbundled network elements, (2) GTE North's implementation of interconnection agreements with at least AT&T Communications of Michigan, Inc. (AT&T) and Sprint Communications Company, L.P., (Sprint) not subject to appeal, and (3) competitors actually purchasing services pursuant to those agreements. Tr. 113-114.

The ALJ recommended that the Commission adopt the Staff's proposed conditions, except the requirement that GTE North not appeal the Commission orders. In his view, there was no lawful basis for limiting a party's right to appeal a Commission order.

In its exceptions, the Staff says that it did not propose to interfere with GTE North's right to appeal any Commission order. Rather, the Staff says, its proposal would require GTE North to make a business decision about whether to appeal the Commission's orders or to satisfy a condition that would permit its affiliate to provide basic local exchange service.

In its exceptions, GTE Communications says that it supports the objective of achieving competition in the marketplace and agrees that the conditions imposed should be competitively neutral; i.e., the conditions must permit GTE Communications to enter the market at the same time as a competitor is able to enter the market. It asserts that the Staff's proposed conditions, even as modified by the ALJ, are more restrictive than necessary and contrary to law. It proposes that it be permitted to provide basic local exchange service in GTE North's exchanges when GTE North's markets become irreversibly open to competition as shown by either (1) the Commission's issuance of a final order establishing wholesale discounts and prices for

unbundled network elements and GTE North's filing of acceptable tariffs or (2) the Commission's approval of an interconnection agreement between GTE North and a nonaffiliated, major competitor pursuant to which the competitor has the ability to purchase services.

GTE Communications argues that a requirement that it satisfy both conditions is not competitively neutral because competitors could be providing service under a wholesale tariff or an approved interconnection agreement, while GTE Communications could not provide service because both conditions had not been satisfied. It also argues that a condition requiring two named competitors to be purchasing services under an approved interconnection agreement is not competitively neutral because competition in GTE North's market does not depend on the identity of the nonaffiliated competitor and because AT&T or Sprint could choose to delay or not enter the market at all.

The Commission concludes that GTE Communications' entry into GTE North's service territory without conditions designed to create competition is contrary to the public interest and that portion of the application should be denied unless those conditions are in place. The Commission further concludes it is not likely that GTE Communications' proposed conditions will result in competitive neutrality.

GTE North's conduct to date does not give the Commission reason to believe that the company will permit competition, at least by nonaffiliated providers. Tr. 109-113.[2] Of greatest importance, both AT&T and Sprint went through the negotiation and arbitration process to develop interconnection agreements with GTE North. The Commission issued final orders requiring action by GTE North on December 12, 1996 in Case No. U-11165 for AT&T

[2]The Staff even questions whether GTE North will permit an affiliate to provide competing basic local exchange service. If that fear is founded, GTE Communicationsj challenges to the Staffjs conditions, and the application itself, are irrelevant.

and January 15, 1997 in Case No. U-11206 for Sprint. As of today, GTE North has refused to comply with those orders, and neither AT&T nor Sprint is able to provide basic local exchange service in GTE North's exchanges. Furthermore, GTE North does not have an approved wholesale tariff.

The Commission agrees with the Staff that GTE North must have filed acceptable tariffs in compliance with a Commission order approving a wholesale tariff and prices for unbundled network elements. The Commission also agrees that GTE North must have an approved interconnection agreement, although the Commission does not agree that it is necessary to specify that the agreement be with AT&T or Sprint. The development of competition does not require that either of those providers complete an interconnection agreement. It is enough that some nonaffiliated competitor do so. With tariffs and an interconnection agreement in place, the Commission concludes that competitors will be in a position to compete with GTE North. Whether they choose to do so at that time will be their business decisions and not a product of GTE North's refusal to permit competition in its exchanges. The Commission is therefore not persuaded that it is necessary to add the condition that competing providers actually be providing service under those tariffs or agreements.

On the other hand, a condition regarding appeals is necessary to prevent GTE North from defeating the competition that is a necessary condition to GTE Communications' entry into the basic local exchange market. It is not necessary to prevent GTE North from appealing. It is only necessary to prevent GTE North and GTE Communications from circumventing the requirement that competition become irreversible before GTE Communications may provide basic local exchange service in GTE North's exchanges. GTE North is free to appeal any order approving a tariff or interconnection agreement. If it appeals those orders, GTE

Communications can enter GTE North's markets when the appeals have run their course, if there is still a Commission-approved tariff and interconnection agreement.

The development of competition will be chilled if GTE Communications can enter the basic local exchange market in GTE North's exchanges while its affiliate challenges the tariffs or interconnection agreements under which others seek to enter the market. Consequently, the Commission finds that it is contrary to the public interest to permit GTE Communications to enter GTE North's service territory while GTE North is seeking to overturn the Commission orders under which competitors, other than GTE Communications, are authorized to provide competitive service. Delaying GTE Communications' entry into GTE North's exchanges until others are free to enter those markets without the cloud of pending appeals will maximize the likelihood that competition in GTE North's service territory exists and is irreversible.

GTE Communications argues that the Commission's approval of a license for Ameritech Communications, Inc. (ACI), an Ameritech Michigan affiliate, to provide basic local exchange service in Ameritech Michigan's and GTE North's exchanges supports the issuance of a license in this case. It points out that both Ameritech Michigan and GTE North are prohibited from bundling local exchange service with long distance service except through a separate affiliate. GTE Communications argues that, like ACI, it will be severely disadvantaged in the marketplace if it cannot offer one-stop shopping in GTE North's exchanges when other providers can do so. GTE Communications acknowledges that ACI's license will become effective in Ameritech Michigan's exchanges when the Federal Communications Commission (FCC) authorizes it to provide in-region interLATA service under Section 271 of the federal Telecommunications Act of 1996 (the FTA). 47 USC 271. It points out that Section 271 does not apply to it, and argues that the Commission cannot lawfully impose restrictions that are

patterned after a statutory provision that does not apply to it. Further, it argues that it is unlawful and unreasonable to tie its license to the conduct of an affiliate that it cannot control.

The Commission's action with regard to ACI supports the decision in this order because the conditions imposed in both cases are designed to permit the affiliate of the incumbent to offer bundled services when the incumbent's exchanges are open to competition. For both companies, the Michigan Telecommunications Act requires the Commission to consider how the grant of a license will affect the public interest. Contrary to GTE Communications' argument, there is no legal requirement that the Commission ignore how the applicant is likely to interact with an affiliate or how that interaction will affect the public interest. In particular, the Commission need not pretend that GTE North and GTE Communications will act without regard to how their separate actions affect the interests of the corporate entity with which they are both affiliated.

If GTE North is serious about permitting competition, as the Michigan Telecommunications Act and the FTA require, the conditions imposed by this order are not impediments to GTE Communications' efforts to provide one-stop shopping. GTE Communications (and other potential competitors) cannot provide basic local exchange service in GTE North's exchanges without interconnection agreements or approved tariffs for wholesale or unbundled network elements. If GTE North does what it must to permit its affiliate to provide service, it will also have done much to satisfy the conditions set forth in this order. It is not unreasonable to require it to do the balance, which will permit competition to exist, as envisioned by both the Michigan Telecommunications Act and the FTA.

GTE Communications argues that Section 253 of the FTA prohibits the Commission from imposing these conditions. Section 253(a) provides: "No State or local statute or regulation,

or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 USC 253(a). The Commission does not dispute that it should not impose conditions that would impede the development of competition in the basic local exchange market. In this case, in light of GTE North's past conduct, it is likely that immediately permitting GTE Communications to provide basic local exchange service in GTE North's exchanges will ensure that competition does not develop in those exchanges. Consequently, under state law, the Commission must impose conditions designed to promote competition and, under federal law and policy as embodied in the FTA and the FCC's actions, may do so. GTE Communications seems to be propounding the absurd position that a state may not impose any requirements on a potential provider, including the requirement that it obtain a license. It is entirely consistent with the interaction of state and federal law for the Commission to impose the conditions in this order. Even the FTA recognizes the need for states to retain authority "to impose, on a competitively neutral basis . . . requirements necessary to . . . protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." 47 USC 253(b).

The ALJ also adopted the Staff recommendation that GTE Communications be required to file legible maps showing the exchanges within which it would offer service.

In its exceptions, GTE Communications argues that there is no currently effective rule that dictates the condition or quality of the maps showing its service territory. It says that it will be using the pre-existing exchange boundaries of Ameritech Michigan and GTE North, which already have maps on file that are accessible to the public, and the Commission should not require it to file duplicate maps. It suggests that it, and other competitive local exchange

providers, be permitted to incorporate by reference the maps of the incumbent local exchange providers. It also suggests that the cost of preparing maps is a significant barrier to those seeking to the enter the basic local exchange market.

The Commission rejects GTE Communications' position. As competition develops, it is likely that all providers will not use the same exchange boundaries and that incumbent providers may seek to alter boundaries or withdraw from certain exchanges. It is therefore reasonable to require a provider to file its own maps showing clearly the areas that it proposes to serve.[3]

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended by 1995 PA 216, MCL 484.2101 et seq.; MSA 22.1469(101) et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACS, R 460.17101 et seq.

b. GTE Communications possesses sufficient technical, financial, and managerial resources and abilities to provide basic local exchange service to every person within the geographic area of the license.

c. Granting GTE Communications a license to provide basic local exchange service in the requested areas, subject to the conditions set forth above, will not be contrary to the public interest.

THEREFORE, IT IS ORDERED that:

[3]It is absurd for a provider with GTE Communicationsj resources to assert that the cost of filing legible maps is a significant barrier to entry.

A. GTE Communications Corporation is granted a license to provide basic local exchange service in Ameritech Michigan's exchanges.

B. GTE Communications Corporation is granted a license to provide basic local exchange service in GTE North Incorporated's exchanges when it has satisfied the conditions set forth in this order.

C. GTE Communications Corporation shall provide basic local exchange service in accordance with the regulatory requirements specified in the Michigan Telecommunications Act, MCL 484.2101 et seq.; MSA 22.1469(101) et seq.

D. Before commencing basic local exchange service, GTE Communications Corporation shall submit its tariff reflecting the services that it will offer and legible maps identifying the exchanges in which it will offer service.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

(S E A L)

/s/ John G. Strand

Chairman

/s/ John C. Shea

Commissioner, concurring in part and dissenting in part in a separate opinion.

By its action of December 12, 1997

/s/ Dorothy Wideman
Its Executive Secretary

/s/ David A. Svanda
Commissioner

C. GTE Communications Corporation shall provide basic local exchange service in accordance with the regulatory requirements specified in the Michigan Telecommunications Act, MCL 484.2101 et seq.; MSA 22.1469(101) et seq.

D. Before commencing basic local exchange service, GTE Communications Corporation shall submit its tariff reflecting the services that it will offer and legible maps identifying the exchanges in which it will offer service.

The Commission reserves jurisdiction and may issue further orders as necessary.

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MICHIGAN PUBLIC SERVICE COMMISSION

_____
Chairman

__By its action of December 12, 1997.

_____
Commissioner, concurring in part and dissenting in part in a separate opinion.

_____
__Its Executive Secretary

_____
Commissioner

In the matter of the application of GTE COMMUNICATIONS CORPORATION for the issuance of a license to provide and resell basic local exchange service in Ameritech Michiganjs and GTE North Incorporatedjs exchanges in the State of Michigan and related approvals.	)	Case No. U-11440

Suggested Minute:

"Adopt and issue order dated December 12, 1997 granting GTE Communications Corporation a license to provide basic local exchange service, as set forth in the order."

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the application of)
GTE COMMUNICATIONS CORPORATION)
for the issuance of a license to provide and)Case No. U-11440
resell basic local exchange service in Ameritech)
Michigan's and GTE North Incorporated's)
exchanges in the State of Michigan and related)
approvals.)

OPINION OF COMMISSIONER JOHN C. SHEA
CONCURRING IN PART AND DISSENTING IN PART

(Submitted on December 12, 1997 concerning order issued on same date.)

The grant or denial of a license for basic local exchange service is governed by Article 3 of the Michigan Telecommunications Act, 1991 PA 179, as amended by 1995 PA 216, MCL 484.2101 et seq; MSA 22.1469(101) et seq. (the "Act"), and specifically, Section 302(1) of the Act. That section requires the Commission to approve an application for a license if the Commission finds the following:

> (a) The applicant possesses sufficient technical, financial, and managerial resources and abilities to provide basic local exchange service to every person within the geographical area of the license.
>
> (b) The granting of a license to the applicant would not be contrary to the public interest.

MCL 484.2302(1); MSA 22.1469(302)(1).

In the accompanying order, the majority concludes that the applicant in the proceeding, GTE Communications Corporation, satisfies the requirements of subsection (a), supra.

Based on the record in this matter, I join the majority in concluding that the applicant has satisfied the requirements of subsection (a), supra.

I am troubled, however, by the majority's fluid understanding of "public interest." In Case No. U-11053, the Commission (including the undersigned) rightly determined that the provisions of Section 101(2) of the Act contained the benchmark for determining the effect on the public interest of the grant or denial of a license. See, August 28, 1996 order in Case No. U-11053 at 20-21. No mention is made of Section 101(2) in the accompanying order. Instead the accompanying order reaches for authority in some unnamed "state law" and "federal law." Put simply, there is no law that would justify the imposition of conditions on the license that is subject to this proceeding.*

Based on the foregoing, I would grant a license without conditions.

John C. Shea, Commissioner

*I view the requirement for legible maps differently: the location of the geographic area of the license cannot be known without legible maps. Therefore legible maps are required. It is absurd to claim otherwise.